Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ROBERT D. CUNNINGHAM JR.,

Petitioner,

v.

RICHARD W. RILEY, SECRETARY,
U.S. DEPARTMENT OF EDUCATION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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106 pp

QUESTIONS PRESENTED

A complainant alleges that Delaware's Child Development Watch program, which receives federal funds, routinely withholds diagnostic information from the families of children with mental retardation, autism, and cerebral palsy, for the purpose of decreasing the demand for services that these families are legally entitled to.

1. In a complaint filed directly against the U.S. Department of Education (DOE) citing violations of the Due Process Clause of the Fifth Amendment, should court analysis of allegations that the DOE is shirking its duty to protect the handicapped and their advocates from discrimination by deliberately mishandling administrative complaints filed under Section 504 of the Rehabilitation Act of 1973 include consideration of the substantive due process and/or equal protection provisions of the Due Process Clause?

2. A previous Delaware District Court ruling has established a different standing requirement for third parties filing Section 504 complaints directly with the courts against federal funding recipients than the standing requirement for filing administrative complaints under Section 504 with the DOE. Should the previous case ruling be revised to allow third parties to file Section 504 complaints directly against the federal funding recipient in court rather than against the federal funding provider for failure to act appropriately in response to administrative complaints?

3. A previous Delaware District Court ruling declined to recognize any protection from retaliation for a non-handicapped advocate for the handicapped under Section

QUESTIONS PRESENTED – Continued

504 and its implementing regulation 34 CFR § 100.7(e) in a case filed against the funding recipient, while in response to an administrative complaint regarding Section 504 and 34 CFR § 100.7(e) the DOE acknowledges protection from retaliation for non-handicapped advocates for the handicapped. Should the previous case ruling be revised to allow for filing in court of illegal retaliation claims made by a non-handicapped advocate under Section 504 and 34 CFR § 100.7(e) against the federal funding recipient rather than filing against the funding provider for failure to act appropriately in response to administrative complaints?

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are listed in the caption.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

JURISDICTION OF THE DISTRICT COURT 17

REASONS FOR GRANTING THE WRIT 18

THE LOWER COURT RULINGS NEGLECTED TO EVALUATE THE DUE PROCESS CLAUSE ALLEGATIONS FOR POSSIBLE VIOLATIONS OF EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS; IT IS A WELL-ESTABLISHED PRINCIPLE OF THE COURTS THAT EVALUATION OF DUE PROCESS CLAUSE ALLEGATIONS INVOLVING DISCRIMINATION SHOULD INCLUDE EXAMINATION OF THE RIGHT OF EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS 18

TABLE OF CONTENTS – Continued

Page

DIFFERENT STANDARDS FOR DETERMINING STANDING ARE BEING USED BY THE COURTS IN CASES FILED UNDER SECTION 504 THAN ARE BEING USED BY THE DOE FOR SECTION 504 COMPLAINTS FILED ADMINISTRATIVELY. THE COURT RULING IN *CUNNINGHAM V. NAZARIO* REGARDING THE EXISTENCE OF PROTECTION FROM RETALIATION IS IN CONFLICT WITH THE ADMINISTRATIVE DETERMINATION BY THE DOE IN *CUNNINGHAM V. RILEY*. THE COURT MAY CHOOSE TO RESOLVE THE LACK OF UNIFORMITY IN STANDING REQUIREMENTS FOR THE FILING OF THIRD PARTY COMPLAINTS UNDER SECTION 504 AND RESOLVE THE CONFLICT BETWEEN CASES REGARDING THE PROTECTION AFFORDED TO THIRD PARTY ADVOCATES VIA SECTION 504 AND ITS IMPLEMENTING REGULATION, 34 CFR § 100.7(e) 23

CONCLUSION 29

APPENDICES ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Ayeni v. Mottola, 35 F.3d 680 (2nd Cir. 1994).....20

Bolling v. Sharpe, 347 US 497 (1953).....19, 20

Canterbury v. Spence, 464 F.2d 772 (DC Cir. 1972).....20

Caulfield v. Board of Education, 583 F.2d 606 (2nd Cir. 1978).....24

Caulfield v. Board of Education, 486 F. Supp. 862 (ED NY 1979).....24

Cunningham v. Nazario (unpublished).....*passim*

Cunningham v. Riley (unpublished).....22, 25, 27, 28

Davis v. Passman, 442 US 228 (1979).....27

Doe on Behalf of Doe v. St. Joseph's Hosp., 788 F.2d 411 (7th Cir. 1986).....23, 24

Examining Board of Engineers, Architects & Surveyors v. Flores de Otero, 426 US 572 (1976).....20

Hampton v. Mow Sun Wong, 426 US 88 (1976).....20

Lowrance v. Achtyl, 20 F.3d 529 (2nd Cir. 1994).....20

Mosley v. Clarksville Memorial Hospital, 574 F. Supp. 224 (MD Tenn 1983).....24

Murphy v. Middletown Enlarged City School District, 525 F. Supp. 678 (SD NY 1981).....24

NAACP v. Medical Center, Inc., 599 F.2d 1247 (3rd Cir. 1979).....26

Simpson v. Reynolds Metals Co., Inc., 629 F.2d 1226 (7th Cir. 1980).....24

TABLE OF AUTHORITIES – Continued

Page

Trageser v. Libbie Rehabilitation Center, 590 F.2d 87 (4th Cir. 1978) 24

Young v. Pierce, 544 F. Supp. 1010 (ED Texas, 1982) .. 21, 27

CONSTITUTIONAL PROVISIONS

Fifth Amendment ..... *passim*

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C.S. § 1331 17

42 U.S.C.S. § 1983 ..... 9, 11, 12, 26

Section 504 of the Rehabilitation Act of 1973 ..... *passim*

REGULATIONS

34 CFR § 100.7(b) 2, 13

34 CFR § 100.7(b-e) 2, 18

34 CFR § 100.7(c-d) 2, 14

34 CFR § 100.7(e) ..... *passim*

34 CFR § 104 Appendix A (9) 2, 18

34 CFR § 104.4 ..... 2, 14, 18

34 CFR § 303.401(a) 2, 3, 19

34 CFR § 303.404 ..... 2, 3, 19

34 CFR §§ 303.510-511 ..... 2, 12

34 CFR § 303.512 ..... 2, 12

TABLE OF AUTHORITIES – Continued

Page

FEDERAL RULES OF CIVIL PROCEDURE

Rule 60(b) 2, 12, 13

Rule 60(b)(6) 28

PETITION FOR WRIT OF CERTIORARI

Robert D. Cunningham Jr. petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1-5) is unpublished. The opinion of the District Court (App. 8-20) is unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 26, 2002 (App. 6-7). A motion for rehearing was denied on June 24, 2002 (App. 45-46). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Constitutional Provisions

Fifth Amendment.....App. 47

Statutes

Section 504 of the Rehabilitation Act of 1973.....App. 47

Regulations implementing Section 504 of the Rehabilitation Act of 1973

34 CFR § 100.7(b) ..... App. 47

34 CFR § 100.7(c) ..... App. 48

34 CFR § 100.7(d) ..... App. 48

34 CFR § 100.7(e) ..... App. 49

34 CFR § 104.4 ..... App. 49

34 CFR § 104.61 ..... App. 50

Appendix A to Part 104(9) App.50

Regulations implementing the Individuals with Disabilities Education Act

34 CFR § 303.401(a) ..... App. 50

34 CFR § 303.404 ..... App. 51

34 CFR § 303.510(a)(b) ..... App. 52

34 CFR § 303.511(a)(b) ..... App. 52

34 CFR § 303.512(a)(b)(c) ..... App. 53

34 CFR § 303.512(4)(d) ..... App. 55

Federal Rules of Civil Procedure

Rule 60(b) ..... App. 55

STATEMENT OF THE CASE

The Child Development Watch (CDW) program was developed by the Delaware Department of Health and Social Services (DDHSS) in the late 1980's with the intention of using the program to satisfy requirements contained within what was then known as Part H (now Part C) of the Individuals with Disabilities Education Act (IDEA). The program is federally funded in part. The purpose of the program is to identify children who either have or who are at high risk for developmental disabilities, and to refer these children and their families to appropriate intervention services. 34 CFR § 303.404 (App. 51), an implementing regulation for Part C, requires informed parental consent for the provision of early intervention services, with informed consent defined in 34 CFR § 303.401(a) (App. 50).

Robert D. Cunningham, Jr., M.D., is a physician board-certified in general pediatrics and neurodevelopmental disabilities, the subspecialty of pediatrics that addresses developmental disabilities in children. Cunningham joined the CDW program in 1988, where he performed physical examinations and developmental evaluations.

While working for the CDW program, Cunningham diagnosed numerous children with conditions such as mental retardation, cerebral palsy, and autism. It is the medical standard of practice in the field of neurodevelopmental disabilities to disclose these diagnoses to families as soon as the diagnoses become apparent, or to alert the families to the possibility of these conditions whenever there is a reasonable suspicion. Over the course of several months, Cunningham was repeatedly told by supervising bureaucrats employed by DDHSS that he must not divulge

these diagnoses to families. The bureaucrats stated that Delaware is a poor state; if Cunningham told families about these diagnoses, then the families in turn would demand additional services which the state government would be legally obligated to provide but was unable to afford.

Cunningham refused to withhold this information and explained that it was unethical and illegal to withhold diagnoses such as mental retardation, cerebral palsy, and autism from families. In February, 1989, Cunningham was told by a supervisor that if he did not agree to withhold this diagnostic information, it might have an adverse impact on his career. In compliance with Delaware's Merit Rules, which require state employees to attempt to resolve controversies through specified administrative processes within the state government before taking them to outside agencies, in February, 1989, Cunningham submitted a written complaint to DDHSS stating that he was being threatened with the loss of his job because of his policy of providing diagnostic information to the families of handicapped children. This written complaint marks the beginning of a very protracted attempt to resolve the controversy administratively through the Merit Rules.

In a meeting with his supervisors in March, 1989, Cunningham was told that, as a condition for retaining his job, he must agree not to make diagnoses of mental retardation, cerebral palsy, or autism. Cunningham stated that he would choose to give up his job rather than agree to the unethical and illegal condition. Cunningham's supervisors instructed Cunningham to submit a letter of resignation, which Cunningham provided in March, 1989.

Cunningham agreed to stay with the CDW clinic for one more month to tie up loose ends. But in March, 1989, Cunningham was directed to drive a government-owned vehicle with a falsified vehicle registration notice (which allowed the vehicle to evade safety inspection) to a rural pubic health clinic. Cunningham lost control of the vehicle and was crushed inside it.

Despite the letter of resignation, after one month in the hospital and another month recuperating at home, Cunningham returned to work part-time at the CDW clinic in June, 1989. Cunningham's supervisors stated that they would like Cunningham to continue working in the CDW clinic, but also stated that Cunningham must agree to withhold diagnoses such as mental retardation, cerebral palsy, and autism from families as a condition for retaining his job. Cunningham refused and his employment ended at the CDW clinic at the end of June, 1989.

Cunningham was begun on worker's compensation payments by the state government. In July, 1989, Cunningham explained to the worker's compensation administrator that he was no longer working for the CDW clinic not because he was physically unable to, but that he refused because he was being asked to do something that was unethical and possibly illegal. Informed of the situation, the worker's compensation administrator elected to continue Cunningham on worker's compensation until he found employment that paid a salary comparable to what he was making before the accident, or for a total of 60 months, whichever came first. The worker's compensation payments continued until March, 1995.

After Cunningham vacated the position with the CDW program, DDHSS employed various physicians, none of

whom had completed a formal training program in neuro-developmental disabilities. The policy of withholding diagnostic information was reinstituted and is still continuing. In July, 1993, Cunningham was asked by DDHSS to work at the CDW clinic on a part-time, temporary basis. A schedule was drawn up and a salary was agreed upon, but when Cunningham again refused to agree to withhold diagnostic information, Cunningham was told that his services would not be needed after all.

Cunningham continued to press his complaints administratively with DDHSS. On January 9, 1994, Cunningham met with a DDHSS administrator who urged Cunningham to stop pursuing the complaints or face unspecified retaliation from the Delaware state government.

Because of his concerns regarding the systematic violation of the civil rights of the handicapped via the withholding of diagnostic information needed for families to give informed consent, and because Cunningham was being unfairly prevented from gaining employment because of his assertion of the rights of the handicapped, on February 14, 1994, Cunningham met with a deputy attorney general from the Delaware Department of Justice to voice his concerns. On February 15, 1994, Cunningham received a telephone call from the same deputy attorney general. The lawyer implied that Cunningham's worker's compensation payments would be cut off if he pursued matters any further.

In response to the continued systematic violation of the civil rights of the handicapped, and the recurring threats of retaliation against Cunningham, Cunningham submitted a complaint dated February 23, 1994 to the

Civil Rights Division of the United States Department of Justice. The complaint contained numerous allegations of civil rights violations, including allegations that would constitute violations of Section 504 of the Rehabilitation Act of 1973 or its implementing regulations.

Over the next several months, the complaint bounced around from one federal agency to another. In a letter to Cunningham, the Department of Justice stated that it did not have jurisdiction over the complaint and passed it on to the Office for Civil Rights of the U.S. Department of Health and Human Services (DHHS). In a letter dated July, 1994, DHHS stated that it did not have jurisdiction over Cunningham's complaint and referred it to the Office for Special Education and Rehabilitative Services (OSER) of the U.S. Department of Education (DOE).

OSER examined the complaint and stated that it did have jurisdiction over the portions of the complaint that constituted violations of IDEA. Cunningham contacted OSER and inquired about whether a civil rights attorney would be addressing the civil rights violations that were included in the complaint, and specifically asked whether OSER was the proper office to address the civil rights violations. Cunningham was told by OSER that its office was the proper place to address Cunningham's civil rights allegations. The complaint was tied up in OSER's offices for the next two years.

In late 1994, the CDW clinic again needed a physician to work there, either part-time or full-time. Cunningham contacted DDHSS, explained that he was still receiving worker's compensation payments, stated that he was interested in working in the CDW clinic, but would not agree to the withholding of diagnostic information from

the families of handicapped children. Cunningham was told that someone would get back to him when it was decided whether to make the position part-time or full-time, and that someone would look into his concerns regarding the withholding of diagnostic information. However, subsequently DDHSS refused to discuss the matter of withholding diagnostic information, and blocked Cunningham's pursuit of employment; instead, the state government simply continued Cunningham's worker's compensation payments.

On November 17, 1994, Cunningham met with one of the pediatricians who had been working in the CDW clinic. The pediatrician confirmed that diagnostic information continued to be withheld from the families of handicapped children. The pediatrician stated that around the end of May or beginning of June, 1994, she resigned her position with the CDW clinic, in part because she was feeling accused of supplying Cunningham with information about the clinic's illegal activities. She asked Cunningham to stop pursuing his complaints against the CDW clinic, because she feared that the Delaware state government would retaliate against her, preventing her from getting a job, and she would lose her health insurance.

While Cunningham's federal administrative complaint bounced around inside the federal bureaucracy, he continued to press his administrative complaint at the state level. As mentioned previously, at the state level Cunningham had submitted a written administrative complaint in February, 1989, stating that he was being threatened with the loss of his job because of his refusal to withhold diagnostic information. At this point, five years later, Cunningham has still not received the required written response to the complaint.

Cunningham asked Delaware's Merit Employees Relations Board to consider the complaint. Throughout the administrative proceedings held at the state level, Cunningham pointed out that he had filed a timely written administrative complaint dated February, 1989, which had still not been responded to. The issue apparently was lost among all the other legal issues, going through every step of the proceeding without being addressed or even acknowledged. The handling of Cunningham's administrative complaint filed with the Delaware state government was pursued through the level of the Delaware Supreme Court, which denied review in June, 1996.

As new incidents of retaliation occurred against Cunningham, Cunningham reported these incidents to whichever federal agency happened to be holding onto Cunningham's initial civil rights complaint. In response, Cunningham was told by one federal bureaucrat that every time Cunningham added a new complaint, the response to Cunningham's original complaint would be delayed even further.

Frustrated with the lack of response from the federal bureaucracy, on May 14, 1996, while his request for review of the handling of his state-level administrative complaint was still pending before the Delaware Supreme Court, Cunningham filed suit against DDHSS under 42 U.S.C.S. § 1983, alleging that DDHSS was violating the free speech and right of privacy protection afforded to the physician-patient relationship. Shortly afterwards, OSER stated that it had changed its mind regarding jurisdiction over some of the civil rights allegations, and now believed that some of the allegations contained in Cunningham's federal administrative complaint would be more appropriately addressed under Section 504 of the Rehabilitation Act of

1973 (App. 47) through the Office for Civil Rights (OCR) of the DOE.

OCR received the Section 504 complaints in June, 1996, and stated to Cunningham that the Section 504 complaints could be pursued in court. Cunningham amended his complaint against DDHSS to include Section 504 allegations. Specifically, Cunningham alleged that the withholding of diagnostic information in the implementation of IDEA for the purpose of restraining special education costs is discriminatory against handicapped children and their families under Section 504. Cunningham also described that he, himself, was victim of multiple incidents of illegal retaliation under Section 504. In a letter dated August 2, 1996, OCR stated:

> "In accordance with OCR procedures, we will not seek resolution of any complaint allegations which are presently being litigated in a court of law. Therefore, we are closing our file on your complaint effective the date of this letter. You may re-file this complaint within 60 days following termination of the proceeding if there has been no decision on the merits or settlement of the complaint allegations."

Shortly after the case against DDHSS was filed, the Delaware Department of Justice lawyer representing the DDHSS defendants filed papers with the court stating that she was requesting of the Delaware Department of Justice that Cunningham be investigated for fraud for receiving worker's compensation payments. Cunningham immediately complained of lawyer misconduct and pointed out the violation of 34 CFR § 100.7(e) (App. 49), the implementing regulation of Section 504 that prohibits acts of retaliation against those asserting the rights of the

handicapped. (Again note that in February, 1994, the Delaware Department of Justice made a similar threat against Cunningham regarding his worker's compensation payments.)

Although the DDHSS defendants and their lawyer possessed copies of the administrative complaints that Cunningham had filed with federal agencies, including a letter from OSER directing the defendants to respond to the complaints, the DDHSS lawyer filed with the court papers stating that Cunningham had not filed administrative complaints with the DOE under IDEA, nor does Cunningham have standing to file administrative complaints on the behalf of the handicapped under IDEA with the DOE.

In the decision in *Robert D. Cunningham v. Carmen R. Nazario, Secretary, State of Delaware Department of Health and Social Services; Charles Konigsberg*, the District Court ruled:

> 1) Because Cunningham was not maintaining physician-patient relationships at the time that the action was filed in District Court, he does not have standing to assert freedom of speech or right to privacy claims on the behalf of the handicapped. (App. 33-35)
>
> 2) Regarding Cunningham's own free speech and right to privacy rights, the statue of limitations for a 42 U.S.C.S. § 1983 claim has expired; Cunningham cannot maintain that the statue of limitations was tolled while pursuing his federal administrative complaints with the DOE because (sic) OSER had determined that it did not have jurisdiction over Cunningham's complaints. (App. 40-41)

3) Cunningham does not have standing to assert the rights of the handicapped under Section 504 of the Rehabilitation Act of 1973. (App. 33-35)

4) Of the allegations of illegal retaliation, the District Court decision only identifies the job discrimination complaint, and states that since Cunningham, himself, is not handicapped, Cunningham cannot file a job discrimination complaint under Section 504. (App. 38 [note]) [Affirmed February, 1998. (App. 22-23) Certiorari denied June 1, 1998].

To support a motion under F.R.C.P. Rule 60(b), Cunningham served a subpoena accompanied by a list of written questions on OSER. OSER responded to the questions (App. 57-60) by stating that anyone, including Cunningham, who has knowledge that the implementing regulations of IDEA are not being complied with has standing to file administrative complaints with the lead agency under 34 CFR §§ 303.510-511 (App. 51-53), and may request Secretarial review of the lead agency's response under 34 CFR § 303.512. (App. 55) [The provision for Secretarial review has since been dropped from the statute. (App. 53-55)] According to OSER, Cunningham has standing to file, and had filed, administrative complaints with DDHSS under IDEA and had requested review of those responses. This response from OSER contradicts the U.S. District Court's findings and conclusion in *Nazario* (App. 40-41), and would presumably require a recalculation of the statute of limitations for complaints made under 42 U.S.C.S. § 1983.

OCR was served with a subpoena and a similar list of questions. In response (App. 61-66), OCR stated that

anyone with knowledge that handicapped individuals are being discriminated against in violation of Section 504 has standing under 34 CFR § 100.7(b) (App. 47-48) to file administrative complaints on the behalf of the handicapped. No close relationship needs to exist between the person filing the complaint and any handicapped individual or group. Furthermore, under 34 CFR § 100.7(e) (App. 49), an implementing regulation of Section 504, an individual asserting a Section 504 right on the behalf of the handicapped is protected against retaliation. The individual is not required to be handicapped to receive this protection. Again, this response contradicts the ruling in *Nazario* (App. 38 [note]).

These statements by the DOE, contradicting the findings and rulings of the District Court decision in *Cunningham v. Nazario*, were filed in support of a motion under F.R.C.P. Rule 60(b) (App. 55-56) to re-open the proceedings. The District Court denied the motion. (Affirmed June 29, 2000. Certiorari denied April 16, 2001.)

In accordance with the directions that OCR had issued to Cunningham in the letter dated August 2, 1996, upon receiving the decision of the U.S. Supreme Court denying certiorari in June, 1998, on or about June 3, 1998, Cunningham re-filed his Section 504 complaints with OCR for resolution administratively.

In a letter dated July 14, 1998, OCR replied:

> ". . . [P]lease be advised that 34 C.F.R. Section 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964, which is incorporated by reference in the regulations enforced by OCR, prohibits the harassment or intimidation of

> individuals who file complaints with OCR and those who cooperate with our investigations.
>
> "With regard to your allegation concerning the withholding of diagnostic information, OCR does not have jurisdiction over this issue under any of the above-cited authorities. This allegation properly comes under the aegis of the Family Educational Rights and Privacy Act (FERPA). . . .
>
> "With regard to your allegation that DPW discriminated against you in its employment practices, please be advised that OCR will not proceed to complaint resolution on allegations which have been the subject of litigation and for which a decision on the merits, including dismissal with prejudice, has been rendered. . . ."

OSER had already acknowledged many times in writing that it has jurisdiction over allegations that a funding recipient was failing to adhere to the regulations, such as those requiring informed consent, contained within IDEA. 34 CFR § 104.4(b)(1)(v) and 34 CFR § 104.4(b)(4) [revised as 34 CFR § 104.4, (App. 49)] are two implementing regulations of Section 504 that forbid federally-funded programs, such as IDEA, from being implemented in a discriminatory manner. Cunningham alleges that the withholding of diagnostic information for the purpose of restraining special education costs is discriminatory, and violates 34 CFR § 104.4. 34 CFR § 100.7(c-d) (App. 48-49) requires that OCR investigate complaints of possible discrimination or non-compliance with Section 504 or its implementing regulations, and attempt to correct the non-compliance.

Cunningham served a subpoena on the Family Policy Compliance Office, the agency responsible for enforcing

FERPA, and the agency confirmed that the issue of illegally withholding diagnostic information does not fall within its aegis.

A decision to dismiss a case for lack of standing or statute of limitations is not a dismissal based on the merits. The decision in *Cunningham v. Nazario* simply put in place a different set of requirements for achieving standing by third parties for cases filed in the courts than are being applied to complaints filed administratively by third parties on the behalf of the handicapped. In addition, the *Nazario* decision refused to acknowledge the protection afforded to non-handicapped individuals by 34 CFR § 100.7(e) or by Section 504; in contrast, OCR has acknowledged that non-handicapped individuals have the right to be protected from acts of retaliation when pursuing discrimination complaints on the behalf of the handicapped.

These contradictions were pointed out to OCR. In response, Cunningham was told by OCR that OCR was not going to respond to any further queries from Cunningham. Despite this, Cunningham continued to press OCR to provide good-faith responses. In a letter dated March 19, 1999, OCR states:

> "Because your complaint involves issues of medical ethics or medical malpractice, your complaint would be more properly reviewed by the U.S. Department of Health and Social Services."

As previously described, Cunningham's complaint had already been reviewed by DHHS, who had determined that the DOE was the federal agency with jurisdiction.

Because it was apparent that OCR was going to continue to stonewall Cunningham's administrative

complaint filed under Section 504, on July 20, 1999, Cunningham filed *Robert D. Cunningham, Jr. v. Richard W. Riley, Secretary, U.S. Department of Education* in U.S. District Court for the District of Delaware.

In the suit, Cunningham alleged that the DOE was violating either Cunningham's rights, or the rights of the handicapped on whose behalf Cunningham was filing suit, under the Due Process Clause of the Fifth Amendment. Specifically, Cunningham alleged that the DOE violated the Due Process Clause by denying that it had jurisdiction over Cunningham's allegations regarding the illegal withholding of diagnostic information, referring Cunningham's complaint to the Family Policy Compliance Office, and then referring Cunningham's complaint to DHHS, despite the DOE being well aware that either OSER or OCR or both could claim jurisdiction over the allegation that diagnostic information was being withheld from families receiving services through IDEA for the purpose of restraining special education costs. In other words, the DOE was being accused of not fulfilling its share of responsibility in the effort to stop discrimination against the disabled, denying the disabled equal protection without benefit of due process, in violation of the Due Process Clause.

In addition, Cunningham alleged that the DOE deliberately misapplied the guidelines computing the statute of limitations for civil rights complaints to avoid dealing with a set of allegations Cunningham made of illegal retaliation under 34 CFR § 100.7(e). (As previously pointed out, OCR will not consider complaints that are elsewhere involved in litigation. If the litigation fails to address the complaints on their merits, the statute of limitations for filing the complaints for consideration by OCR runs from the time that all such litigation and

administrative proceedings have concluded. Although OCR has acknowledged the existence of this guideline, its refusal to adhere to it is the source of this set of complaints.) And finally, Cunningham alleged that the DOE improperly invoked *res judicata* to avoid addressing Cunningham's complaints despite being well aware that the previous court cases had not achieved decisions based upon the merits of the complaints. A motion to dismiss was granted on May 16, 2000.

The dismissal was based on the following: The District Court found that the DOE's function in handling Cunningham's complaints was investigative rather than adjudicative. In the absence of the exercise of adjudicative authority, due process considerations cannot be involved. Even if the DOE mishandled Cunningham's complaints as alleged, because Cunningham was still free to file suit against the funding recipients under Section 504, any right Cunningham may possess to have his Section 504 claims addressed were not compromised by the DOE's action. (App. 14-20)

Cunningham appealed, and the Court of Appeals for the Third Circuit affirmed on February 26, 2002 (App. 1-7). Reargument was denied on June 24, 2002 (App. 45-46).

JURISDICTION OF THE DISTRICT COURT

This case involves violations of the Due Process Clause of the Fifth Amendment of the United States Constitution.

28 U.S.C.S. § 1331 gives U.S. District Court jurisdiction over the described matters.

REASONS FOR GRANTING THE WRIT

The Lower Court Rulings Neglected To Evaluate The Due Process Clause Allegations For Possible Violations Of Equal Protection And Substantive Due Process; It Is A Well-Established Principle Of The Courts That Evaluation Of Due Process Clause Allegations Involving Discrimination Should Include Examination Of The Right Of Equal Protection And Substantive Due Process

Section 504 of the Rehabilitation Act of 1973 (App. 47) and its implementing regulations forbid discrimination against handicapped students participating in federally funded programs. Discriminatory employment practices, to the extent that they result in discrimination against the intended beneficiaries of federally funded programs, are also forbidden. [See 34 CFR § 104.4 and Part (9) of Appendix A to § 104 (App. 49, 50)] Depending upon the circumstances, the right not to be discriminated against represents either property or liberty rights that may be asserted by a third party, such as a service provider. 34 CFR § 100.7(b-e) (App. 47-49), implementing regulations of Section 504, establishes: 1) a right of third parties to file administrative complaints on the behalf of the handicapped with the federal funding agency; 2) a right to have the complaint evaluated and, if necessary, investigated in a good-faith manner; 3) a right to have the discriminatory practice complained of resolved, and; 4) a right of the complainant not to suffer from acts of retaliation.

From the Due Process Clause of the Fifth Amendment of the U.S. Constitution (App. 47) arises the procedural and substantive rights of due process and the right of equal protection. Discrimination against minority groups by government agencies is not to be a function of a government action, and would therefore be considered a violation of substantive due process and/or equal protection. *See Bolling v. Sharpe,* 347 US 497 (1953).

The Child Development Watch (CDW) program was established to meet the requirements of the Individuals with Disabilities Education Act (IDEA) for the purpose of identifying children who either have, or are at high-risk for developing, developmental disabilities. In order to receive services, all families must provide informed consent [34 CFR § 303.401(a), 34 CFR § 303.404 (App. 50, 51)]. For many children, there is no intervention service that has been proven to be effective in ameliorating the disabling condition; in such instances, the chief service that is being provided is simply the provision of information to the family, which will help the family better understand the child's disability.

While working for the CDW clinic, Cunningham was told by bureaucrats within the Delaware Department of Health and Social Services (DDHSS) to withhold diagnoses such as mental retardation, cerebral palsy, and autism from the families of handicapped children. Cunningham was told by his superiors that Delaware is a poor state that cannot afford the services that these families might seek, and would be legally entitled to, if this diagnostic information was divulged.

It is widely agreed among medical ethicists and parents that diagnostic information, such as the diagnosis

of a severe handicapping condition in a child, should not be withheld from families. The case of *Canterbury v. Spence*, 464 F.2d 772 (DC Cir. 1972) is perhaps a seminal ruling regarding informed consent. Presumably, the withholding of information needed to provide informed consent for the purpose of deterring families from seeking services that they are legally entitled is a form of discrimination against the handicapped.

A series of federal court decisions have long held that discrimination is considered a violation of the substantive due process and/or equal protection provisions of the Due Process Clause, and that court analysis of discrimination complaints filed under the Due Process Clause should include consideration of these provisions. *See Bolling v. Sharpe*, 347 US 497 (1953); *Hampton v. Mow Sun Wong*, 426 US 88 (1976); *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero*, 426 US 572 (1976); *Ayeni v. Mottola*, 35 F.3d 680 (2nd Cir. 1994) [quoting *Lowrance v. Achtyl*, 20 F.3d 529, 531, 537 (2nd Cir. 1994)].

Cunningham alleges that the withholding of diagnostic information for the expressed purpose of limiting access to services that families with disabled children are legally entitled to is "arbitrary, conscience-shocking, or oppressive in a constitutional sense." Cunningham contends the state-government employees who gave Cunningham this directive were well aware of its illegality.

In *Cunningham v. Riley*, Cunningham requested of the District Court a determination of whether the failure of the U.S. Department of Education to accept jurisdiction of complaints of illegal discrimination (the illegal withholding of information needed for families to provide informed consent, for the purpose of decreasing special

education costs) made under Section 504 of the Rehabilitation Act of 1973 and its implementing regulations violates the rights derived from the Fifth Amendment's Due Process Clause. Cunningham claims that it is obvious that the DOE and OCR have jurisdiction over the complaint, and any denial of jurisdiction by the DOE or claim made by the DOE that another agency, such as the Family Policy Compliance Office or DHHS, has jurisdiction over the complaint cannot be credibly made, and therefore represents not a good-faith response but a deliberate evasion of responsibility, discriminatory against the disabled population. [Previously, it has been held that federal supervising agencies may be sued for discrimination under the Due Process Clause for failure to contribute their fair share to the fight against discrimination. *See Young v. Pierce*, 544 F. Supp. 1010 (ED Texas, 1982).]

Similarly, the DOE is well aware of the rules by which the statute of limitations is to be calculated for complaints made under 34 CFR § 100.7(e). Although Cunningham can point to where each allegation regarding illegal retaliation was filed with an agency within either 180 days of its occurrence or 60 days of the conclusion of a legal or administrative proceeding, and there is no apparent dispute over when Cunningham took each of these actions, the DOE consistently misapplies the statute of limitations and refuses to investigate and remedy the allegations. Cunningham maintains that these responses by the DOE were not made in good faith.

Furthermore, the DOE is obviously aware that a dismissal by a court of allegations made under Section 504 for lack of standing is not a decision based on the merits; it should not affect the evaluation of an administrative complaint filed under Section 504, because the DOE is

utilizing a different set of standing requirements than specified by the courts for allegations filed directly in a court action. Therefore, the DOE's claim of *res judicata*, represents illegal stonewalling rather than a good-faith response.

Cunningham maintains that these types of deliberate abuses by the DOE are shocking to the conscience and should have been evaluated by the lower courts under the Due Process Clause for possible violations of substantive due process and/or equal protection.

Instead of addressing these controversies, the court rulings (App. 4-5, 14-20) have limited themselves to an examination of the right of procedural due process, which is not an issue since no adversarial proceeding has occurred. In essence, the lower courts have thus far evaded evaluating the actual claims being made with regard to the relevant provisions of the Due Process Clause.

It is a long-held principle of the federal courts that, unless a particular right is otherwise specified when an allegation regarding the Due Process Clause is made, all rights derivable from the clause should be examined for applicability. This principle has not been adhered to by the lower courts in *Cunningham v. Riley*, and therefore the case should be remanded for further consideration.

Different Standards For Determining Standing Are Being Used By The Courts In Cases Filed Under Section 504 Than Are Being Used By The DOE For Section 504 Complaints Filed Administratively. The Court Ruling In *Cunningham V. Nazario* Regarding The Existence Of Protection From Retaliation Is In Conflict With The Administrative Determination By The DOE In *Cunningham V. Riley*. The Court May Choose To Resolve The Lack Of Uniformity In Standing Requirements For The Filing Of Third Party Complaints Under Section 504, And Resolve The Conflict Between Cases Regarding The Protection Afforded To Third Party Advocates Via Section 504 And Its Implementing Regulation, 34 CFR § 100.7(e).

The parents of the mentally retarded themselves frequently have IQ's in the mentally retarded range, although the parents are often never formally diagnosed as being mentally retarded. An even greater number of parents of the mentally retarded have IQ's in the borderline range (71-85). These parents do not have the cognitive abilities to do the legal research needed to assert the rights of their children. They are likely not to comprehend that there is a right of informed consent. And these parents do not have the financial resources to hire an attorney to assert their rights.

So, if the rights of these families and their children are to be asserted within a court in Delaware, the reality of the situation is that a third party must undertake this endeavor. Multiple cases have established that third parties have standing to assert the rights of others under certain circumstances. In *Doe on Behalf of Doe v. St. Joseph's Hosp.*, 788 F.2d 411, 421 (7th Cir. 1986), it was held that discrimination against doctors "necessarily

causes discrimination against the primary beneficiary of the federal aid" [quoting *Trageser v. Libbie Rehabilitation Center*, 590 F.2d 87, 89 (footnote omitted) (4th Cir. 1978), cert. denied, 442 U.S. 947]. *See Simpson v. Reynolds Metals Co., Inc.*, 629 F.2d 1226, 1235, n.16 (7th Cir. 1980); *Mosley v. Clarksville Memorial Hospital*, 574 F. Supp. 224, 236 (MD Tenn 1983); *Murphy v. Middletown Enlarged City School District*, 525 F. Supp. 678, 708 (SD NY 1981); *see also Caulfield v. Board of Education*, 583 F.2d 606, 610-11 (2nd Cir. 1978) (court approved government investigation of discrimination in the employment of teachers because discriminatory employment practices adversely affect minority children).

In *Caulfield v. Board of Education*, 486 F. Supp. 862 (ED NY 1979), affirmed 632 F.2d 999 (2nd Cir. 1980), cert. denied, 450 US 1030 (1981), it was determined that the Office for Civil Rights of the U.S. Department of Health, Education and Welfare had jurisdiction to investigate racial discrimination in teacher employment, since such discrimination, as a matter of law, discriminates against students who are direct beneficiaries of federal funds.

Delaware's nascent ruling in *Cunningham v. Nazario* regarding Section 504 complaints filed by non-handicapped advocates for the handicapped directly against federal funding recipients substantially complicates the assertion of the rights of disabled children and their families by a third party. According to the 1997 *Cunningham v. Nazario* ruling, Cunningham, although he was providing services to the disabled at the time that he initiated the administrative complaint process protesting the illegal directive regarding the withholding of diagnostic information, was not employed as a service provider at the time that *Cunningham v. Nazario* was filed with

District Court (having already been forced to resign). And therefore Cunningham does not have standing to assert the rights of the disabled under Section 504 in a suit filed directly against the funding recipient. (App. 32-35) Furthermore, according to the same ruling, the DOE had determined that Cunningham does not even have standing to file administrative complaints on the behalf of disabled children under IDEA. (App. 28, 40)

While laboring to assert the rights of the disabled, Cunningham was crushed inside a car, forced to resign his job, threatened with the loss of his worker's compensation payments, threatened with a fraud investigation, etc., all related to his work to prevent the illegal withholding of diagnostic information. According to the ruling in *Cunningham v. Nazario*, Section 504 provides protection only to the handicapped, and since Cunningham himself is not handicapped, Cunningham has no protection under Section 504 from acts of retaliation, including discriminatory employment practices. (App. 38 [note])

When *Cunningham v. Riley* was filed, the DOE was forced off the sideline and made to address the court regarding its own interpretation of Section 504 and its implementing regulations, and the contrast between the DOE's interpretation of the laws protecting the disabled and the new case law established by the ruling in *Cunningham v. Nazario* is shocking. According to the DOE:

> 1) Cunningham and other third parties have the right to file administrative complaints on the behalf of the handicapped under IDEA. (App. 57-60) [This contradicts a factual finding in *Cunningham v. Nazario* regarding what the DOE determination actually was regarding Cunningham's standing to file administrative complaints, and implies the failure to correctly calculate the

statute of limitations for claims made under 42 U.S.C.S. § 1983 in *Cunningham v. Nazario*. (*See* App. 28, 40)]

2) Cunningham and other third parties have standing to file administrative complaints on the behalf of the handicapped under Section 504 with the DOE. (App. 61-63, 65) [Although not an absolute contradiction of the ruling in *Cunningham v. Nazario* (App. 32-35), it is a major incongruity. Cunningham can locate nothing to indicate an intent by lawmakers to create different standing requirements for third party complaints filed under Section 504 with the courts than exist for the filing of administrative complaints directly with the DOE. Besides, employing physicians less qualified than Cunningham, based upon their willingness to withhold diagnostic information, i.e., discriminate against the handicap, easily qualifies as employment discrimination because the ultimate target of the discrimination is the intended beneficiary, handicapped children.]

3) Cunningham is protected from acts of retaliation under 34 CFR § 100.7(e), an implementing regulation of Section 504. (App. 63-66) [Again, this appears to contradict the ruling in *Cunningham v. Nazario* (App. 38 (note)), which refused to recognize the existence of this protection. It should be noted that this protection can be derived directly from Section 504 on the grounds that retaliation against the advocates for the disabled is a proxy for discrimination against the disabled, and is therefore illegal under Section 504.]

In Delaware in the case of *NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3rd Cir. 1979), a coalition of groups

representing minorities including the disabled filed suit alleging that the relocation of medical services away from downtown Wilmington was discriminatory. The coalition succeeded in obtaining a court order instructing the Secretary of the U.S. Department of Health, Education, and Welfare (HEW) to gather facts relating to an administrative complaint filed under Title VI of the Civil Rights Act of 1964 and Section 504. This was followed by a compliance review by HEW concluding that Title VI and Section 504 were being violated, and HEW subsequently engaged in efforts to gain compliance. [*See also Young v. Pierce,* 544 F. Supp. 1010, 1019 (ED Texas, 1982) (where a right to file directly against the federal funding provider under the Due Process Clause was found).] In *Cunningham v. Riley,* Cunningham sought a similar type of relief in his suit against the DOE.

More recently, the U.S. Supreme Court has adhered to a principle that, whenever possible, discrimination complaints filed directly against a federal funding recipient are preferred to complaints against the federal funding provider. Because of the ruling in *Cunningham v. Nazario* regarding third party standing requirements, Cunningham cannot assert the rights of the disabled in a court action filed directly under Section 504 against the funding recipient, or presumably the funding provider. But because the DOE has issued a different interpretation of the requirements for standing for filing administrative complaints under Section 504, and Cunningham satisfies these requirements, the situation passes into the realm described by *Davis v. Passman,* 442 U.S. 228 (1979), where the only means by which a right may be asserted before the courts is through a suit filed directly against the

federal government under the Due Process Clause of the Fifth Amendment.

The contradictions and incongruities that exist between the DOE's statements in *Cunningham v. Riley* and the court ruling in *Cunningham v. Nazario* suggest that the ruling in *Cunningham v. Nazario* is incorrect. Rather than simply build upon an incorrect ruling and allow the suit against the DOE to continue, it may be wiser to remand the proceeding, with instructions issued to the lower courts granting standing to third party advocates for the handicapped, such as Cunningham, to file complaints directly against the federal funding recipient. Under these circumstances, the lower courts should be agreeable to a re-opening of *Cunningham v. Nazario* via a motion filed under F.R.C.P. Rule 60(b)(6) and joint reconsideration of *Nazario* with *Riley* in order to gain consistency.

But under the present ruling in *Cunningham v. Nazario*, the only realistic means to assert the rights of the disabled, particularly the mentally retarded, is through administrative complaints filed by third parties on their behalf with the DOE under Section 504. And if the DOE deliberately mishandles these administrative complaints, then the right of substantive due process and equal protection has been denied to the disabled and their non-handicapped advocates.

The Court should bear in mind that if Cunningham participates in a neurodevelopmental disabilities clinic in private practice in Delaware, he will be seeing as patients children who had been previously evaluated by the CDW clinic, and telling their families for the first time that their children have conditions such as mental retardation, cerebral palsy, or autism. And in some instances, he will be

informing families that they carry specific genes responsible for their child's disability. And, over and over again, for perhaps hundreds of families, he will be telling them that their government deliberately withheld this information from them, for the purpose of restraining special education costs. This provision of diagnostic information to families was supposed to occur at no charge through the CDW program, but in a private practice setting the families will be billed. And many families will not be able to afford the cost of this service, and in essence will be denied their right to this information.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

Page

United States Court of Appeals for the Third Circuit Opinion; Robert D. Cunningham Jr., M.D. v. Richard W. Riley, Secretary ..... App. 1

United States Court of Appeals for the Third Circuit Judgment; Robert D. Cunningham Jr., M.D. v. Richard W. Riley, Secretary, Dated February 26, 2002 ..... App. 6

United States District Court for the District of Delaware Memorandum Opinion; Robert D. Cunningham Jr. v. Richard W. Riley, Secretary, United States Department of Education, Dated May 16, 2000 ..... App. 8

United States District Court for the District of Delaware Order; Robert D. Cunningham Jr, v. Richard W. Riley, Secretary, United States Department of Education, Dated May 16, 2000 ..... App. 21

United States Court of Appeals for the Third Circuit Judgment Order; Robert Cunningham v. Carmen R. Nazario, Delaware Department of Health and Social Services; Charles Konigsberg, Dated February 17, 1998 ..... App. 22

United States District Court for the District of Delaware Memorandum Opinion; Robert D. Cunningham Jr., M.D. v. Carmen R. Nazario, Secretary, Delaware Department of Health and Social Services; Charles Konigsberg, Dated August 29, 1997 ..... App. 24

United States District Court for the District of Delaware Order; Robert D. Cunningham Jr., M.D. v. Carmen R. Nazario, Secretary, Delaware Department of Health and Social Services; Charles Konigsberg, Dated August 29, 1997 ..... App. 43

APPENDIX TABLE OF CONTENTS – Continued

Page

United States Court of Appeals for the Third Circuit Judgment Order Denying Appellant's Petition For Rehearing; Robert D. Cunningham Jr., M.D. v. Richard W. Riley, Secretary, Dated June 24, 2002 ..... App. 45

Constitutional And Statutory Provisions Involved ..... App. 47

Statement Of Policy By Office For Special Education, United States Department Of Education, Regarding Administrative Complaints Filed Under Part C ..... App. 57

Statement Of Policy By Office For Civil Rights, United States Department Of Education, Regarding Administrative Complaints Filed Under Section 504 of the Rehabilitation Act of 1973 ..... App. 61

UNREPORTED – NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-1986

ROBERT D. CUNNINGHAM JR., M.D.,

Appellant

v.

RICHARD W. RILEY, Secretary

On Appeal From the United States District
Court for the District of Delaware
(D. Del. Civ. No. 99-cv-00460)
District Judge: Honorable Sue L. Robinson

Submitted Under Third Circuit LAR 34.1(a)
FEBRUARY 26, 2002
Before: SLOVITER, AMBRO and WEIS, Circuit Judges.

OPINION

PER CURIAM.

Robert D. Cunningham, Jr., M.D., appeals from the District Court's orders dismissing his complaint for failure to state a claim upon which relief can be granted and denying his motion for reargument. For the following reasons, we will affirm.

In 1988, the Delaware Division of Public Health (DDPH) hired Cunningham as a developmental pediatrician in its Child Development Watch program. Cunningham resigned in 1989 in protest over what he claimed was the DDPH's policy of withholding diagnostic information from families of children with disabilities and its instructions to Cunningham to withhold such information. In 1996, Cunningham filed an action against the DDPH in the District Court for the District of Delaware titled *Cunningham v. Nazario, et al.*, asserting claims under 42 U.S.C. § 1983 and § 504 of the Rehabilitation Act, 29 U.S.C. § 794. Cunningham claimed, *inter alia*, that the DDPH's withholding of information, such as a diagnosis of mental retardation or autism, discriminated against the disabled because it effectively precluded them from seeking government-funded services that they might benefit from. Further, he claimed that he was subjected to retaliation and discrimination for his refusal to abide by the DDPH's policy. The District Court dismissed the claims in *Nazario* for want of standing, expiration of the statute of limitations, and failure to state a claim. This Court affirmed by judgment order, and the Supreme Court denied certiorari review.

Thereafter, in 1998, Cunningham resumed his pursuit of an administrative complaint that he had filed in 1996 with the United States Department of Education's Office of Civil Rights (OCR).[1] In July 1998, the OCR informed

---

[1] The DDPH is a recipient of federal funds from the Department of Education. The OCR is responsible for ensuring that recipients of federal funds comply with § 504 of the Rehabilitation Act. If the OCR finds that a recipient has violated § 504, the Secretary of the Department of

(Continued on following page)

Cunningham that it did not have jurisdiction to address his allegations regarding the DDPH's withholding of diagnostic information. Moreover, the OCR advised that it would not investigate his claims against the DDPH of § 504 retaliation and discrimination because those claims had been decided on the merits in *Nazario*. After Cunningham persisted, the OCR again advised in March 1999 that it would not investigate his claims.

In July 1999, Cunningham commenced this action against the Secretary of the Department of Education by filing a 144-page complaint (with 4-volume appendix), alleging that he was denied his Fifth Amendment right to due process in the OCR's handling of his claims. Cunningham sought injunctive relief to compel the OCR to investigate and resolve his claims. The District Court granted the Secretary's motion to dismiss for failure to state a claim. Relying on *Hannah v. Larche*, 363 U.S. 420 (1960), and *Jenkins v. McKeithen*, 395 U.S.C. 411 (1969), the District Court held that the OCR's handling of Cunningham's complaint did not implicate any adjudicatory power on the part of the Secretary, and in the absence of an exercise of adjudicatory power, due process considerations did not attach. The District Court noted that Cunningham had filed suit against the DDPH in *Nazario*, and that the actions of the OCR had no effect on that case. The District Court concluded that "to the extent that [Cunningham] is arguing that he had a property or liberty right to have OCR's investigation continue or be conducted in a particular way, his claim has no foundation in the law as he had

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Education has the authority to effect compliance by, among other things, terminating the recipient's funding. 34 C.F.R. § 100.8

no entitlement to any particular set of due process protections in connection with OCR's investigation." May 16, 2000, Mem. Op. at 12. After the District Court denied Cunningham's timely filed motion for reargument, Cunningham timely filed this appeal.

We have jurisdiction under 28 U.S.C. § 1291. Our review of a decision to grant a Rule 12(b)(6) motion is plenary. *West v. Pennsylvania*, 251 F.3d 420, 425 (3d Cir. 2001). We accept all factual allegations in the complaint as true, and we draw all reasonable inferences in the light most favorable to the plaintiff. *Id.* We will affirm only if no relief could be granted under any set of facts that the plaintiff could prove. *Id.*

We fully agree with the District Court that Cunningham had no protected liberty or property interest in the OCR's investigation or handling of his § 504 claims. Consequently, we will affirm the dismissal of the complaint.

Cunningham argues that the dismissal of his complaint is "in conflict" with the District Court's ruling in *Nazario* because in *Nazario* Cunningham was held to lack standing to file a third party complaint under § 504 against the DDPH, while the District Court noted here that Cunningham could file suit against the DDPH. We fail to discern any conflict. The holding here is that Cunningham had no entitlement to any particular set of due process protections in connection with the OCR's investigation of his complaint. The holding in *Nazario* was that Cunningham lacked standing to pursue his § 504 claims against the DDPH in federal court. The two holdings are not inconsistent. It is true that the District Court noted here that "plaintiff was free to file suit against the DDPH

under § 504." May 16, 2000, Mem. Op, at 11-12. But Cunningham takes this statement out of context and ascribes it a meaning that the District Court did not intend. Indeed, as the District Court clearly explained in denying Cunningham's motion for reargument, "the statement was made in the context of the OCR; i.e., the actions of the OCR had no effect on the plaintiff's ability to file suit. The fact that plaintiff is barred from pursuing a § 504 action on grounds other than the OCR's actions is irrelevant to the analysis at bar." Mar. 28, 2001, Order at ¶ 3.

Cunningham's remaining contentions are without merit and in need of no further discussion.[2] We will affirm the District Court's judgment. Cunningham's request for oral argument is denied.

[2] Given our affirmance of the dismissal of the due process claims (which were the only claims raised in the complaint), we need not reach the Secretary's alternative grounds for affirmance – that no private right of action exists under § 504 and no right of direct action against the Department of Education exists under the Administrative Procedures Act.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-1986

ROBERT D. CUNNINGHAM JR., M.D.,

Appellant

v.

RICHARD W. RILEY, Secretary

On Appeal From the United States District
Court for the District of Delaware
(D. Del. Civ. No. 99-cv-00460)
District Judge: Honorable Sue L. Robinson

Submitted Under Third Circuit LAR 34.1(a)
FEBRUARY 19, 2002
Before: SLOVITER, AMBRO and WEIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was submitted pursuant to Third Circuit LAR 34.1(a). On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered March 28, 2001, be and the same is hereby AFFIRMED. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron

Clerk

DATED: February 26, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT D. CUNNINGHAM JR.,
Plaintiff

v.

RICHARD W. RILEY, Secretary,
United States Department of Education,
Defendant.

Civil Action No. 99-460-SLR

Robert D. Cunningham, Jr., M.D.,
pro se.

Carl Schnee, United States Attorney, and Patricia C. Hannigan, Assistant United States Attorney, United States Attorney's Office, Wilmington, Delaware. Attorneys for Defendants. Of Counsel: Kathyrn M. Woodruff, United States Department of Education, Washington, D.C.

MEMORANDUM OPINION

Dated: May 16, 2000

Wilmington, Delaware

/s/ Sue L. Robinson

Robinson, District Judge

I. INTRODUCTION

Plaintiff Robert D. Cunningham, Jr. filed this action on July 20, 1999 against defendant Richard W. Riley, Secretary, United States Department of Education, alleging violations of his Fifth Amendment due process rights.

(D.I. 1 & 2) Plaintiff's allegations arise out of the Department of Education's Office of Civil Rights' ("OCR") actions with respect to allegations of discrimination in violation of § 504 of the Rehabilitation Act of 1973 ("the Rehabilitation Act"), 29 U.S.C. § 794, on the part of the Delaware Division of Public Health ("DDPH"). (D.I. 1, 2, & 14) Plaintiff seeks injunctive relief; specifically, he is asking this court to order OCR to address in a "clear and explicit response" his allegations of discrimination. (D.I. 1, 2, & 14)

Currently before the court is defendant's motion to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6). (D.I. 15) For the following reasons, defendant's motion shall be granted.

II. BACKGROUND

This case has a convoluted factual background, which the court will refrain from paraphrasing in any detail.[1] Suffice to say, plaintiff on or about February 23, 1994 filed a complaint with the Department of Justice, alleging numerous violations of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*, by his ex-employer DDPH. His complaint centered on DDPH's alleged policy of withholding diagnostic information from the families of disabled children. Five years earlier, in 1989, plaintiff had resigned his employment with the Delaware Child Development Watch Program, a component of DDPH, in part because of a dispute over this alleged policy. Between the time of his resignation and the

[1] The court notes that the facts essentially are undisputed.

filing of his complaint with the Department of Justice, plaintiff had complained about this policy to numerous State agencies and administrators.

Determining that it lacked jurisdiction over plaintiff's complaint, the Department of Justice on June 8, 1992 forwarded the complaint to the Department of Health and Human Services' Office for Civil Rights. This office subsequently determined that it too lacked jurisdiction over the matter and referred the complaint to the Department of Education's Office of Special Education and Rehabilitative Services ("OSERS") in July 1994. OSERS later notified plaintiff that it had referred his complaint to the State of Delaware for processing.

On May 14, 1996, plaintiff filed suit against DDPH in the United States District Court for the District of Delaware, alleging violations of 42 U.S.C. § 1983. He subsequently amended his complaint to add § 504 discrimination allegations. Specifically, he alleged that the withholding of diagnostic information and the mislabeling of disabled children "results in discrimination against the handicapped because it misleads families away from government-funded education, social and medical services." (D.I. 3 at A63) Plaintiff further alleged that he was discriminated and retaliated against in his employment when he refused to comply with and complained about DDPH's alleged policy of withholding diagnostic information.

On June 20, 1996, plaintiff filed a complaint with OCR, alleging the § 504 portions of his amended complaint in the District Court action. In light of the pending litigation, OCR declined to seek resolution of plaintiff's complaint,

informing plaintiff that he could refile it within 60 days of resolution of the then pending litigation.

The District Court subsequently dismissed plaintiff's amended complaint in August 1997, which dismissal was affirmed by the Third Circuit Court of Appeals in February 1998. The Supreme Court denied certiorari on June 1, 1998.

On June 3, 1998, plaintiff refiled his complaint with OCR. On July 14, 1998, OCR wrote plaintiff, informing him that it did not have jurisdiction to consider his allegations concerning the withholding of diagnostic information. (D.I. 6 at A1) In that regard, OCR referred plaintiff to the Family Policy Compliance Office. (D.I. 6 at A1) OCR further indicated that it would not review plaintiff's allegations of discrimination and retaliation in his employment as they have been the subject of litigation. (D.I. 6 at A2) OCR informed plaintiff that it was closing its file on the matter. (D.I. 6 at A2)

Despite OCR's response, plaintiff continued to pursue his complaint with that office. By letter dated March 19, 1999, OCR informed plaintiff, *inter alia*, that

> OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities receiving Federal financial assistance. The D[D]PH is a recipient of Federal funds from the Department. However, the subject matter of your complaint does not involve issues covered by the regulations enforced by OCR. This fact prevents OCR from moving to complaint resolution in this matter.

Because your complaint involves issues of medical ethics or medical malpractice, your complaint would be more properly reviewed by the U.S. Department of Health and Human Services . . . .

OCR procedures require that complaints be filed within 180 days of the date of an alleged discriminatory act. Your OCR complaint is untimely, with regard to issues concerning employment, retaliation and alleged discriminatory practices during your tenure at D[D]PH, as there were several periods of time in excess of 180 days between the last date(s) of alleged discrimination in this matter and any action you took pursuant to the filing of your complaint. OCR procedures allow for waiving that requirement when such complaints are filed within 60 days of the termination of any administrative or judicial proceeding. However, the materials you have submitted indicate that there are several periods of time in excess of 60 days between the termination of an administrative or judicial proceeding and any subsequent action you took pursuant to the filing of a complaint with OCR. Primarily, the material you have provided indicates that D[D]PH refused to rehire you in June, 1989. There was then a four-year hiatus between that date and July or August 1993, when you indicate that you wrote to Thomas Carper, Governor of Delaware and Carmen Nazario, Director of DPH, to report these illegal practices after DPH refused a second time to hire you in July, 1993. We also note that the U.S. District Court also found your complaint to be untimely.

* * *

> With regard to your allegation that D[D]PH discriminated against you in its employment practices, as we informed you in our letter of July 14, 1998, OCR will not proceed to complaint resolution on allegations which have been the subject of litigation and for which a decision on the merits, including dismissal with prejudice, has been rendered. Similarly, if a matter that was in litigation has been settled, OCR will not proceed. We have reviewed the decision of the United States Court of Appeals for the Third Circuit, Docket Number 97-7521, affirming the dismissal of your complaint by the District Court for Delaware. OCR will not review those matters which have been adjudicated by the Federal Courts.

(D.I. 6 at A52-56)

On July 20, 1999, plaintiff filed this lawsuit against defendant. In his complaint, plaintiff alleges that OCR mishandled his § 504 allegations against DDPH and thereby violated his Fifth Amendment due process rights. Plaintiff's complaint contains fourteen (14) causes of action, which essentially fall into three categories. Counts 1 through 3 allege that OCR mishandled the complaint when it determined that it did not have jurisdiction to consider some of the allegations therein. Counts 4 through 13 allege that OCR misapplied the relevant statute of limitations to Plaintiff's allegations. Count 14 alleges that OCR misapplied the doctrine of res judicata to those allegations that had been addressed in the District Court action.

III. STANDARD OF REVIEW

In deciding a motion to dismiss under Rule 12(b)(6), a court primarily must consider the allegations contained in the complaint, although matters of public record, orders, items appearing in the record of the case as well as exhibits attached to the complaint may also be taken into account. *See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). In ruling on a 12(b)(6) motion, the factual allegations of the complaint must be accepted as true. *See Cruz v. Beto*, 405 U.S. 319, 322 (1972) (*per curiam*). Moreover, the court is bound to give the plaintiff the benefit of every reasonable inference to be drawn from those allegations. *See Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746 (1963); *Schrob v. Catterson*, 948 F.2d 1402, 1405 (3d Cir. 1991). Accordingly, the court must resolve any ambiguities concerning the sufficiency of the claims in favor of the plaintiff. *See Hughes v. Rowe*, 449 U.S. 5, 10 (1980) (*per curiam*). Thus, the "court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); accord *Ransom v. Mazzaro*, 848 F.2d 398, 401 (3d Cir. 1988). Where, as here, the Plaintiff is a *pro se* litigant, the court has an obligation to construe the complaint liberally. *See Haines v. Kerner*, 404 U.S. 519, 520-521 (1971); *Gibbs v. Roman*, 116 F.3d 83, 86 n.6 (3d Cir. 1997); *Urrutia v. Harrisburg County Police Dept.*, 91 F.3d 451, 456 (3d Cir. 1996).

IV. DISCUSSION

Arguing that OCR's investigation did not implicate any adjudicatory powers, defendant seeks to dismiss plaintiff complaint for failure to state a claim on which

relief can be granted. The Supreme Court in *Hannah v. Larche*, 363 U.S. 420 (1960), held that persons whose conduct is under investigation by the United States Commission on Civil Rights are not entitled by virtue of the due process clause of the Fifth Amendment to rights such as apprisal, confrontation, and cross-examination. *See id.* at 44146. The Court noted that

> "[d]ue process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to the specific factual contexts. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

Id. at 442 In rejecting the appellants' challenge to the procedures of the Civil Rights Commission, the Court emphasized the investigatory function of the Commission:

> [I]ts function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.

Id. at 441 The Court concluded that

> when government agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when government action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used.

Id. at 442

The Court reaffirmed its decision in *Hannah* and elaborated further on the distinction between investigative agencies and adjudicatory or accusatory agencies in *Jenkins v. McKeithlen*, 395 U.S. 411 (1969). In *Jenkins*, the Court found that the plaintiff had stated a cause of action that the procedures of the Louisiana Labor-Management Commission of Inquiry failed to meet the requirements of due process. *See id.* at 431. After reviewing the Act authorizing creation of the Labor-Management Commission, the Court distinguished that body from the Civil Rights Commission in *Hannah*. While the Labor-Management Commission

> does not adjudicate in the sense that a court does, nor does the commission conduct, strictly speaking, a criminal proceeding. . . . [n]evertheless, the Act, when analyzed in light of the allegations of the complaint, makes it clear that the Commission exercises a function very much akin to making an official adjudication of criminal culpability. . . . In short, the Commission very clearly exercises an accusatory function; it is empowered to be used and allegedly is used to find named individuals guilty of violating the criminal laws of

> Louisiana and the United States and to brand them as criminals in public.

Id. at 427-28. Given this view of the purpose of the Labor-Management Commission, the Court concluded that its procedures did not meet minimal due process requirements, specifically mentioning the Act's limitations on the rights of a person being investigated to confront and cross-examine the witnesses against him. *See id.* at 428. Thus, in order for due process protections to attach, the inquiry must go beyond an investigation and become accusatory in nature. *See Hannah*, 363 U.S. at 442. Consistent with this precedent, the court must first determine the nature and function of OCR's action with respect to plaintiff's allegations, and then decided whether, in light of this finding, the procedures complained of violate the due process clause of the Fifth Amendment.

OCR is responsible for enforcing § 504 of the Rehabilitation Act and its implementing regulation, 34 C.F.R. Part 104, which prohibits discrimination on the basis of handicap in any program or activity receiving Federal financial assistance. 34 C.F.R. § 104.1 (1999) Consistent with this mandate, OCR has the duty to conduct investigations whenever a complaint alleging discrimination is filed by "[a]ny person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part."[2] *Id.* at § 100.7(b). Included within the ambit of protected activity is the filing of complaints; thus, the

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[2] The procedural requirements of the regulation implementing Title VI of the Civil Rights Act of 1964 are incorporated by reference in the regulation implementing § 504 of the Rehabilitation Act. *See* 34 CFR § 104.61.

harassment or intimidation of individuals who file complaints with OCR is prohibited. *See id.* at § 100.7(e) Investigations conducted by OCR

> include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

Id. at § 100.7(c). If discrimination is detected, the Secretary of the Department of Education or his designee is directed to inform the recipient of the matter and attempt resolution through informal means. In order to overcome the effects of discrimination, the Assistant Secretary of OCR may require the recipient to take such remedial action as is deemed necessary. *See id.* at § 104.6. If the noncompliance cannot be corrected through informal avenues, the Secretary of the Department of Education may effect compliance

> by the suspension or termination of or the refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

Id. at § 100.8(a). An order terminating, suspending, or refusing to grant or continue Federal financial assistance cannot be effected until the applicant or recipient has been

given notice and the opportunity for a hearing. *See id.* at § 100.8(c).

In the case at bar, OCR's investigation of plaintiff's allegations of § 504 violations did not implicate any adjudicatory powers. Rather, OCR merely processed the complaint pursuant to federal regulations, an investigative as opposed to an adjudicative function. In so doing, OCR determined it did not have jurisdiction to pursue plaintiff's allegations. OCR having made such a determination, the Secretary of the Department of Education was in no position to exercise his adjudicatory power, i.e., when only the investigative powers of an agency are utilized, due process considerations do not attach. *See, e.g., Hannah*, 363 U.S. at 442; *United States v. Elias*, 465 F.2d 765, 769-70 (3d Cir. 1972); *Popovic v. United States*, 997 F. Supp. 672, 678. In processing and investigating plaintiff's complaint, OCR did not affect plaintiff's legal rights. At all times, plaintiff was free to file suit against the DDPH under § 504 of the Rehabilitation Act of 1973, and the actions of OCR had no effect on such claims or their *de novo* review by a court of competent jurisdiction.[3] *See, e.g., Connor v. EEOC*, 736 F. Supp. 570 (3d Cir. 1990); *Francis-Sobel v. University of Maine*, 597 F.2d 15 (1st Cir. 1979). Accordingly, to the extent that plaintiff is arguing he had a property or liberty right to have OCR's investigation continue or be conducted in a particular way, his claim has

[3] As noted above, plaintiff did file suit in the United States District Court for the District of Delaware, alleging violations of § 504. That the suit was dismissed with respect to plaintiff's allegations of discrimination and retaliation in his employment for failure to assert standing is irrelevant to the analysis at bar.

no foundation in law as he had no entitlement to any particular set of due process protections in connection with OCR's investigation.[4]

V. CONCLUSION

For the foregoing reasons, the court finds that plaintiff's complaint fails to state a cause of action against defendant Richard W. Riley, Secretary, United States Department of Education. Accordingly, the court shall grant defendant's motion to dismiss. (D.I. 15)

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[4] Having so decided, the court need not address defendant's assertion that plaintiff had no private right of action against the Department of Education under § 504 and no right of direct action against the Secretary or the Department of Education under the Administrative Procedure Act.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT D. CUNNINGHAM JR.

Plaintiff

v.

RICHARD W. RILEY, Secretary,
United States Department of Education,

Defendant.

Civil Action No. 99-460-SLR

ORDER

At Wilmington this 16th day of May, 2000, consistent with the memorandum opinion issued this same date;

IT IS ORDERED that defendant Richard W. Riley, Secretary, Department of Education's motion to dismiss (D.I. 15) is granted.

/s/ Sue L. Robinson
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-7521

ROBERT CUNNINGHAM

Appellant

v.

CARMEN R. NAZARIO, Delaware Department of Health and Social Services;
CHARLES KONIGSBERG

On Appeal from
the United States District Court
(D.C. Civ. No. 96-00247)
District Judge:
Honorable Joseph J. Farnan, Jr.

Submitted under Third Circuit
LAR 34.1(a)
February 4, 1998
BEFORE: GREENBERG, SCIRICA, and NYGAARD,
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED and ORDERED that the orders of the district court from which the appeal has been taken, be and are hereby affirmed.

Costs taxed against appellant.

BY THE COURT:

/s/ _____
Circuit Judge

ATTEST: /s/ P. Douglas Sisk, Clerk

DATED: Feb 17, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT D. CUNNINGHAM JR., M.D.
Plaintiff

v.

CARMEN R. NAZARIO, SECRETARY
DELAWARE DEPARTMENT OF
HEALTH and SOCIAL SERVICES,
CHARLES KONIGSBERG
Defendants.

Civil Action No. 96-247-JJF

Robert D. Cunningham, Pro Se Plaintiff.

Wendy A. Rising, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware. Attorney for Defendants.

MEMORANDUM OPINION

August 29, 1997
Wilmington, Delaware

Filed August 29, 3:39 PM, 1997
Clerk U.S. District Court
District of Delaware

/s/ Joseph F. Farnan Jr.
Farnan, Chief Judge

Presently before the Court are numerous related motions and requests for reargument, reconsideration, and relief from judgment filed by Plaintiff, Robert Cunningham,

Jr., in this civil rights action against Defendants, the Delaware Department of Health and Human Services and various state officials. On March 31, 1997 the Court issued an Order (D.I. 78) granting Defendants' Motion to Dismiss Plaintiff's Complaint. On April 4, 1997, the Court issued a Memorandum Opinion (D.I. 79) explaining its reasons for the previously entered Order. In accord with the Memorandum Opinion and Order, Plaintiff's case was closed.

On April 4, 1997, the Court received a letter from Plaintiff suggesting that the Court made "an inadvertent judicial error" in its March 31, 1997 Order. (D.I. 80). Upon receipt of this letter, the Court informed the parties that it would treat Plaintiff's letter as a Motion for Reargument of the Court's March 31, 1997 Order pursuant to Local Rule 7.1.5. (D.I. 81). Thereafter, Plaintiff filed three more documents directly related to the reargument, a Motion To Amend Motion For Reargument (D.I. 86), and a Supplementary Motion for Reargument (D.I. 91).[1]

Without waiting for the Court to rule on his pending motion for reargument, Plaintiff also filed a Motion for Relief from Judgment or Order; Motion for Sanctions (D.I. 90), in which Plaintiff reiterates a number of the arguments set forth in his reargument papers. In an effort to untangle the procedural quagmire in this case and to frame the issues that would be considered in the reargument/relief from judgment context, the Court informed the parties by letter, that it would consider Defendants' Motion

[1] Plaintiff has also filed discovery motions and numerous letters reiterating his position with the Court.

to Dismiss in opposition to the Amended Complaint. (D.I. 93).

For the reasons set forth below, the Court concludes that the claims raised by the Plaintiff's Amended Complaint fail for lack of standing, expiration of the statute of limitations and failure to state a claim upon which relief may be granted. Therefore, the Court will deny Plaintiff's requests for reargument and Motion for Relief from Judgment and will grant Defendants' Motion to Dismiss Plaintiff's Amended Complaint.[2]

BACKGROUND

On May 14, 1996, Plaintiff filed a Complaint (D.I. 1) against DHHS and Secretary Carmen Nazario, seeking a preliminary injunction to correct the alleged mislabeling of handicapped children by the Child Development Watch Clinic ("Child Watch"), a state agency run by DHSS. On July 2, 1996, Plaintiff filed an Amended Complaint (D.I. 16). In addition to providing more factual background, Plaintiff's Amended Complaint (1) names Charles Konigsberg, director of Public Health, as an additional defendant; (2) adds a cause of action under Section 504 of the Rehabilitation Act of 1973; and (3) seeks $600,000 in damages

[2] Following the Court's prior dismissal of Plaintiff's Complaint, Plaintiff's filings indicate that he was unclear as to the status of various motions that the Court dismissed as moot. In order to prevent that confusion, the Court here notes that upon dismissal of the Amended Complaint, Plaintiff's case in the District Court will be closed. Because this dismissal is a final order, Plaintiff is, of course, free to file an appeal with the United States Court of Appeals for the Third Circuit, if he disagrees with Court's decision.

from Defendants Konigsberg and Nazario for Plaintiff's alleged loss of ability to obtain employment in Delaware and for the anguish Plaintiff suffered in attempting to preserve his rights and the rights of children with disabilities and their families. Because the Court informed the parties that it will rely on the Amended Complaint in the context of the instant motions, the Court derives its factual background entirely from the Amended Complaint.

From July 1988 through June 1989, Plaintiff, a developmental pediatrician, was employed at the Child Watch Clinic in Milford, Delaware. During his employment, Plaintiff claims the staff and pediatricians incorrectly labeled children with cerebral palsy, autism, or mental retardation with the such general terms as "developmentally delayed" or "learning disabled," rather than with the most specific diagnosis available.

As a result of this alleged mislabeling, Plaintiff claims that the staff pediatricians at Child Watch could be subjected to malpractice actions for failure to properly diagnose or wrongful birth actions in cases where genetic testing could have been performed to detect hereditary mental retardation. In addition, Plaintiff raises concerns about the adverse affects that this mislabeling practice could have on the families and children involved. In an effort to bring this practice to the attention of the proper personnel, Plaintiff alleges that he filed a protest letter. However, Plaintiff contends his letter was ignored. In March, 1989, Plaintiff submitted a letter of resignation, stating his intent to resign at the end of April, 1989. Prior to his resignation, however, Plaintiff alleges that he was injured in an on the job accident. Following the accident, Plaintiff returned to work on a part-time basis, but resigned permanently in June 1989.

Beginning in July 1989, Plaintiff began to receive worker's compensation payments. Plaintiff alleges that he sought re-employment with Child Watch on two separate occasions, once in July 1993 and once in June 1994. However, Plaintiff alleges that he was denied re-employment, because of his position on the mislabeling practice. Plaintiff further alleges that he drafted a complaint, outlining his attempts to return to employment and his allegations that Child Watch was operating outside of existing laws, and submitted the complaint to the state government and the United States Department of Education.

On the state level, Plaintiff's complaint was referred to the Merit Employee Relations Board (the "Board"). After reviewing the complaint, the Board made a number of findings of fact and ultimately dismissed the complaint as untimely. Plaintiff appealed, and the Board's decision was upheld by the Delaware Superior Court and the Delaware Supreme Court.

On the federal level, Plaintiff alleges that the U.S. Department of Education instructed the state government to resolve the complaint within a sixty day time period. However, Plaintiff alleges that the state government refused to meet with him. Thereafter, Plaintiff alleges that the Department of Education informed him by letter that it did not have jurisdiction over Plaintiff's complaints, but that Plaintiff could pursue his claims in a court of law.

Subsequently, Plaintiff filed the instant action, alleging that the mislabeling practice that occurs at Child Watch results in a number of constitutional and statutory violations. First, Plaintiff alleges that the mislabeling practice violates the First Amendment. In this regard,

Plaintiff argues that the free speech rights of the staff at Child Watch are violated, because the State maintains a "de facto policy" of forbidding the disclosure of precise diagnoses. In addition, Plaintiff claims that his own free speech rights were violated when he was asked to withhold diagnostic information from families. Second, Plaintiff alleges that the mislabeling violates the privacy rights of families that utilize Child Watch by preventing them from obtaining appropriate education regarding their children's disabilities, appropriate services and support groups to help them cope with the disabilities, and the funds allocated for mentally retarded individuals through Supplemental Social Security Income.

Additionally, Plaintiff claims that because of its mislabeling practice, Child Watch violates the following six statutes: (1) 34 CFR § 303.404, which requires Child Watch to obtain written parental consent prior to initiating early prevention services, (2) 34 CFR § 303.322, which requires Child Watch to perform multi-disciplinary evaluations by qualified personnel; (3) 34 CFR § 303.521, which prohibits Child Watch from charging fees for evaluations and assessments performed; (4) 34 CFR § 303.344, which requires Child Watch to develop an individualized family plan identifying the child's risk factor or diagnosis and revealing the same to the family; (5) 34 CFR § 303.512, which requires the State to implement a grievance system for alleged violation of the Act; and (6) 34 CFR § 303.321, which requires the State to establish a comprehensive Child Find Program to identify, locate, and evaluate children eligible for services.

Lastly, Plaintiff claims that the alleged mislabeling results in violations of Section 504 of the Rehabilitation Act of 1973. According to Plaintiff, the mislabeling of

children and the withholding of the correct diagnoses results in discrimination against the handicapped, because it misleads families away from government-funded education, social and medical services. Further, Plaintiff alleges that he was discriminated against when he allegedly refused to abide by the State's discriminatory policy of mislabeling.

As relief for the above mentioned violations, Plaintiff asks the Court to order (1) Child Watch to immediately cease from withholding diagnostic information, (2) an audit and survey of Child Watch's patient files by an examiner with expertise in developmental pediatrics and a correction of the mislabeling that the examiner finds; (3) the State to purchase a conspicuous advertisement in the state newspapers apologizing to handicapped individuals for withholding information from them, (4) the State to establish a hotline for those who fear they had information withheld from them by Child Watch, and (5) the State to hire a physician with experience in childhood developmental disabilities to supervise and provide care in the Child Watch clinics. In addition, Plaintiff demands repayment of all his legal costs and damages in the amount of $600,000 against Defendants Konigsberg and Nazario, individually, for his loss of employment and for the anguish he endured in bringing his claims.

DISCUSSION

In discerning Plaintiff's grounds for reargument, the Court will rely on Plaintiff's letter suggesting "inadvertent judicial error," his Motion to Admit Amended Complaint, his Motion To Amend Motion for Reargument and his Supplementary Motion For Reargument (collectively,

the "Reargument Papers"). In the Reargument Papers, Plaintiff essentially sets forth three grounds for reargument.[3] First, Plaintiff claims that he has both individual and third party standing to sue, based on his failed attempts to obtain re-employment with the clinic and on his physician-patient relationship, respectively. Second, Plaintiff claims that the Court erred in denying his discovery requests, because discovery could assist him in establishing standing. Third, Plaintiff alleges that the Court should not have dismissed his Motion For Relief from Fraud as moot, and should have allowed Plaintiff the opportunity to conduct discovery on the alleged fraud.

In his Motion for Relief from Judgment or Order, Plaintiff asks this Court for relief pursuant to Federal Rule of Civil Procedure 60(b). In support of the requested relief, Plaintiff essentially reiterates his argument that the State Defendants committed fraud.

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[3] In his Reargument Papers and Motion For Relief from Judgment Or Order, Plaintiff alleges that his Amended Complaint should be considered, because under Rule 15(a), Plaintiff should have been permitted to amend his pleadings once as a matter of course before a responsive pleading was served. In their Motion to Dismiss, the State Defendants state that "[b]ecause the Motion [requesting immediate closure of all Child Watch clinics] in essence amends the remedy sought in the complaint, and both the complaint and the motion are based upon the same allegedly unconstitutional practices, Plaintiff's motion is treated as an amendment to his complaint." (D.I. 8 at 1). Rather than debate whether Plaintiff had in fact amended once as a matter of course by filing his motion, and was therefore, required to seek leave of Court to amend, the Court will accept Plaintiff's Amended Complaint for purposes of the reargument proceedings. Therefore any alleged legal error caused by the Court's prior decision to strike the Amended Complaint has been avoided. For this reason, Plaintiff's Motion to Admit Amended Complaint (D.I. 85) will be granted.

In response to these arguments[4], the State Defendants contend that Plaintiff's Amended Complaint fails to cure his lack of standing, and that discovery on the matter will not assist in curing the defect in standing. Defendants further contend that Plaintiff's claims are barred by the statute of limitations and that Plaintiff's assertions of fraud and misconduct are baseless.

I. Standing

In order for a federal court to consider the legal merits of a claim, the plaintiff must establish, as a threshold matter, that he or she has standing to sue. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). In order to establish standing, Plaintiff must satisfy three requirements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). First, Plaintiff must have suffered "an injury in fact." *Id.* An injury in fact requires an invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not merely conjectural or

[4] While the State Defendants have not filed any formal response briefing to Plaintiff's Reargument Papers and Motion For Relief From Judgment Or Order, the Court indicated to the parties that it would consider Defendants' Motion To Dismiss (D.I. 8) as against Plaintiff's Amended Complaint. Because the Defendant's Reply Brief In Support Of Motion To Dismiss (D.I. 50) was part of the briefing sequence that commenced with the Motion to Dismiss, the Court will consider the arguments contained in that document, as well. Lastly, in a letter dated April 17, 1997 (D.I. 88), the State Defendants responded to some of the arguments raised by Plaintiff and indicated that they wished to rely on the arguments set forth in their Opposition To Plaintiff's Motion For Relief From Fraud And Misconduct (D.I. 54). Therefore, the Court will also consider the arguments raised in these documents.

hypothetical. Second, Plaintiff must establish a causal connection between the injury and the conduct that is the subject of Plaintiff's complaint. In other words, the injury must be "fairly traceable to the challenged action of the defendant and not the result of the independent action of a third party who is not before the court." *Id.* Third, Plaintiff must show that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* Where, as here, standing is challenged on the basis of the pleadings, the Court will accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party. *See Pennell v. San Jose*, 485 U.S. 1,7 (1988) (citations omitted).[5]

In this case, the Court concludes that Plaintiff lacks standing to pursue the free speech, privacy, IDEA and Rehabilitation Act claims that he asserts on behalf of disabled children and families affected by the alleged mislabeling. Specifically, the Court concludes that Plaintiff has not satisfied the injury in fact requirement for standing. It is a basic premise of constitutional law, that Plaintiff, himself, must have suffered the injury he seeks to redress. Here, Plaintiff seeks to redress alleged injuries to the privacy and free speech rights of third parties. Ordinarily, one may not claim standing to vindicate the constitutional rights of a third party. *Powers v. Ohio*, 499 U.S. 400 (1991). Therefore, under the general rule, the Court

[5] In his Reargument Papers, Plaintiff argues that discovery will assist him in establishing standing, because it will show that he was actively seeking re-employment at Child Watch and that he was denied re-employment because of his position on the labeling of handicapped children. Because the Court is accepting Plaintiff's allegations as true, Plaintiff's requests for discovery are denied as moot.

concludes that Plaintiff lacks standing to bring the instant claims on behalf of third parties.

However, there is an exception to the general principle that has become known as "third-party standing." The Supreme Court has recognized that litigants have the right to bring actions on behalf of third parties, if three criteria are met. *See Powers*, 499 U.S. at 413-14; *Singleton v. Wulff*, 428 U.S. 106, 114-15 (1976); *Amato v. Wilentz*, 952 F.2d 742, 747-50 (3d Cir. 1991). First the litigant must have suffered an injury in fact, which gives him or her a sufficiently concrete interest in the outcome of the dispute. Second, the litigant must have a close relation to the third party. And, third, there must exist some hindrance to the third party's ability to protect his or her own interests.

In this case, Plaintiff argues that because he has the "right to seek re-employment as a developmental pediatrician" he has the right to assert the rights of "his prospective patients." (D.I. 86). In support of this proposition, Plaintiff cites those cases in which doctors have been found to have standing to raise the rights of their female patients, in challenging statutes that restrict abortions. However, a fundamental difference between these cases and the instant case, is that in the doctor-patient cases, the doctors were employed as physicians and, as such, maintained current doctor-patient relationships, which established the basis for the "close relationship" requirements of third party standing. *See e.g. Planned Parenthood Assn. v. Miller*, 934 F.2d 1462, 1465 (11th Cir. 1991) (holding that physician has standing to challenge parental notification provision on behalf of his minor patients). In this case, Plaintiff is no longer employed as a pediatrician at Child Watch. Indeed, Plaintiff voluntarily resigned from Child Watch and has been collecting worker's compensation.

As such, Plaintiff is not currently practicing medicine and maintains no current doctor-patient relationships with the children and families who utilize Child Watch. Moreover, that Plaintiff may have been seeking re-employment and may have been denied re-employment because of his views about the labeling of handicapped children, does not assist him in establishing doctor-patient relationships with the children and families whom he sought to serve. The doctrine of third party standing is applied hesitantly, and the Court declines to expand the doctrine to embrace the hypothetical, "potential patients," of a doctor who is not currently practicing medicine and who maintains no current doctor-patient relationships. *See Singleton v. Wulff*, 428 U.S. 106, 113 (1976) (recognizing that courts proceed hesitantly when third party rights are asserted), Henry P. Monaghan, *Third Party Standing*, 84 Colum. L. Rev. 277 (1984) (expressing concern over judicial expansion of third party standing). For these reasons, the Court concludes that Plaintiff has failed to establish standing to pursue the free speech, privacy, IDEA and Rehabilitation Act claims that he raises on behalf of disabled children and their families.

With regard to Plaintiff's Section 1983 claims that the State Defendants violated his First and Fourteenth Amendment rights, the issue of Plaintiff's standing is more complex. While the State Defendants argue that Plaintiff has not suffered an economic injury, because he voluntarily resigned and was collecting worker's compensation, the Court is not persuaded by this argument. If Plaintiff was denied a protected property interest when he was not re-hired, then arguably, Plaintiff would have suffered an injury sufficient to establish standing. However, an inquiry into whether Plaintiff had a legally

protected property interest in being re-hired, for example, would require the Court to blend the concept of standing with a decision on the merits, and the court declines to engage in that tortured analysis.

In cases such as this, where complex standing issues are raised and demonstration of the claimed injury would be inseparable from the merits, courts have avoided the standing issue and have examined the justiciability of the claims on other grounds. *See* 13A Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3531.15 (1984), *Elkin v. Fauver*, 969 F.2d 48, 52 & n.1 (3d Cir. 1992) (avoiding full examination of standing requirements and proceedings to merits of claim); *Coker v. Sullivan*, 902 F.2d 84, 87-88 (D.C. Cir. 1990) (stressing propriety of avoiding complex standing issues where case is more simply resolved on another basis); *In re Merrill Lynch Relocation Management, Inc.*, 812 F.2d 1116 (9th Cir. 1987) (avoiding standing issue where argument is readily disposed of on the merits); *New England MultiUnit Housing Laundry Assn. v. Rhode Island Housing & Mort. Fin. Corp.*, 893 F. Supp. 1180, 1191 & n. 14 (D.R.I. 1995) (declining "Defendant's invitation to decide the thorny issue of whether Plaintiffs have standing to sue" and disposing of case on other grounds). Therefore, in accord with this line of jurisprudence, the Court will assume that Plaintiff has standing to assert his claims that the State Defendants violated his First and Fourteenth Amendment rights, and will examine these

claims in light of the other grounds that the State Defendants raise for dismissal.[6]

II. Failure To State A Claim

Although the State Defendants argue that Plaintiff's Fourteenth Amendment claims should be dismissed for lack of standing, the Court believes that the State Defendant's argument is more properly characterized as seeking dismissal on the ground that Plaintiff has failed to state a claim. Although Plaintiff's claim does not articulate expressly whether his failure to re-hire claim is based upon Equal Protection or Due Process, the Court concludes that under either analysis Plaintiff has failed to state a claim for which relief can be granted. *See Fed. R. Civ. P.* 12(b) (6).

In order to state a claim under the Equal Protection Clause of the Fourteenth Amendment, the Plaintiff is required to allege that he was discriminated against on the basis of his membership in a protected class. In this case, Plaintiff has not alleged that his failure to be re-hired was based on any illegal or discriminatory reasons. Moreover, Plaintiff has not alleged that he is a member of any protected class, or that he was treated differently from others similarly situated on a constitutionally protected basis. *See Nelson v. Payne*, 827 F. Supp. 1273, 1275-76 (S.D. Tex. 1992) (holding that Plaintiff failed to establish that school's decision not to re-hire him violated the

[6] Again, with regard to these claims, Plaintiff's request for discovery to assist him to establish standing will be denied as moot, because the Court will assume, without deciding, that Plaintiff does have standing to maintain these claims.

Fourteenth Amendment, where Plaintiff failed to allege discrimination on basis of membership in protected class), *aff'd*, 18 F.3d 935 (5th Cir. 1994). At most, Plaintiff has alleged that he was not re-hired because of his differing views on the labeling of handicapped children. Because such differences of opinion are neither illegal nor discriminatory, Plaintiff has failed to establish an Equal Protection claim.[7]

Likewise, Plaintiff has also failed to establish a claim under the Due Process Clause, because he has failed to allege that he was deprived of a legally protected property interest. As the Supreme Court stated in *Roth v. Board of Regents*, "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead have a legitimate claim of entitlement to it." 408 U.S. 564, 577 (1972). Such a legitimate claim of entitlement may be created by "existing rules or understandings that stem from an independent source such as state laws." *Id.* In this case, Plaintiff does not allege any statutory entitlement to the position he sought, nor does

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[7] In his Amended Complaint, Plaintiff states, "In essence, the Plaintiff was discriminated against when he refused directions provided by the state government that were discriminatory against the handicapped . . . " To the extent that Plaintiff's Amended Complaint can be construed to state a claim under the Rehabilitation Act or the Equal Protection Clause on the basis of discrimination against the handicapped, the Court rejects the Plaintiff's claim. Even if Plaintiff was denied employment because of his views regarding the handicapped, he was not denied employment because he was handicapped. As such, Plaintiff has failed to state a claim that he was discriminated against in violation of either the Equal Protection Clause or the Rehabilitation Act.

he allege that there was an understanding between himself and the State Defendants that he would, in fact, be re-hired. Because Plaintiff has failed to allege that he was deprived of a legally protected property interest, Plaintiff has failed to establish a claim under the Fourteenth Amendment.

III. Statute of Limitations

Plaintiff's remaining Section 1983 claim is based upon the First Amendment. In stating his claim under the First Amendment, Plaintiff alleges that during his employment at Child Watch, the State Defendants violated his freedom of speech by requiring him to withhold diagnostic information from patients. Assuming arguendo, the Plaintiff has standing to pursue this claim, the Court must dismiss Plaintiff's claim on the ground that the applicable statute of limitations for the claim has expired.

In *Wilson v. Garcia*, the United States Supreme Court held that, for purposes of determining the applicable state statute of limitations, Section 1983 claims should be characterized as personal injury claims. 471 U.S. 261 (1985). In Delaware, the applicable statute of limitations for personal injury actions is two years. 10 Del. C. § 8119. Therefore, Plaintiff's Section 1983 claim based upon the First Amendment is subject to a two year limitations period.

In this case, the latest possible date of the alleged violations of Plaintiff's First Amendment rights by the State Defendants would have been June 30, 1989, the last day of Plaintiff's employment with the State. Under the applicable statute of limitations, Plaintiff should have filed the instant claim that his First Amendment rights were

violated, no later than June 30, 1991. Because Plaintiff filed the instant action almost five years later, on May 14, 1996, Plaintiff's First Amendment claim is time-barred.

In an effort to overcome the statute of limitations, Plaintiff raises two arguments for tolling. (D.I. 18). First, Plaintiff raises the continuing wrong doctrine. However, Plaintiff's Amended Complaint does not allege that the State Defendants have continued to impede his speech, and therefore, the Court concludes that this doctrine is inapplicable to his claim.

Second, Plaintiff raises the argument that the statute of limitations was tolled during Plaintiff's pursuit of administrative remedies under 20 U.S.C. § 1400. In support of his argument, Plaintiff relies on the Tenth Circuit's opinion in *Association For Community Living in Colorado v. Romer*, 992 F.2d 1040 (10th Cir. 1993). While the Tenth Circuit recognized that "a plaintiff must exhaust administrative remedies before bringing a 42 U.S.C. § 1983 action for relief that is also available under the IDEA," this rationale is inapplicable to Plaintiff's First Amendment claim. *Id.* at 1044. The purpose of the IDEA is to ensure that "all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate the handicapped children." 20 U.S.C. § 1400(c). Redressing alleged violations of the First Amendment rights of an individual who lacks standing to raise a claim under the IDEA in the first place, is simply not within the purview of the statute.

Therefore, the Court rejects Plaintiff's tolling argument, and concludes that Plaintiff's First Amendment claim is time-barred.

IV. Fraud

In his Reargument Papers and Motion For Relief From Judgment or Order, Plaintiff argues that the Court should consider the allegations of fraud and misconduct that he advanced in his previously filed Motion For Relief From Fraud And Misconduct. (D.I. 53). In these documents, Plaintiff alleges, among other things, that the State Defendants committed fraud by mischaracterizing facts and legal arguments.

Under Rule 60(b), the determination to grant or deny relief is within the sound discretion of the trial court. *See* 12 Moore's Federal Practice § 60.22 (3d ed. 1997); *Laskey v Continental Products Corp.*, 804 F.2d 250 (3d Cir. 1986). In this case, the Court has reviewed the documents submitted by the State Defendants and finds the representations contained therein to be within the bounds of zealous advocacy and neither fraudulent nor intentionally misleading. Therefore, the Court will deny Plaintiff's allegations of fraud. Accordingly, the Court will deny Plaintiff's request for reargument, and Motion For Relief From Judgment, Motion For Sanctions to the extent that they raise the issue of fraud.

CONCLUSION

For the reasons set forth above, Plaintiff's Motion To Admit Amended Complaint (D.I. 85) and Motion To Amend Reargument (D.I. 86) will be granted, and Plaintiff's

requests for reargument (D.I. 81, 91) and Motion For Relief From Judgment Or Order; Motion For Sanctions (D.I. 90) will be denied. Accordingly, the State Defendants' Motion To Dismiss Plaintiff's Amended Complaint (D.I. 8) will be granted.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT D. CUNNINGHAM JR., M.D.
Plaintiff,

v.

CARMEN R. NAZARIO, SECRETARY
DELAWARE DEPARTMENT OF HEALTH
and SOCIAL SERVICES,
CHARLES KONIGSBERG,
Defendants.

Civil Action No. 96-247-JJF
Filed: August 29, 3:38 PM 1997
Clerk, U.S. District Court
District of Delaware

ORDER

At Wilmington this 29 day of August 1997, for the reason set forth in the Memorandum Opinion to be issued this date;

IT IS HEREBY ORDERED that:

1. Plaintiff's Motion To Admit Amended Complaint (D.I. 85) is GRANTED

2. Plaintiff's Motion to Amend Reargument (D.I. 86) is GRANTED.

3. Plaintiff's requests for reargument (D.I. 81, 91) are DENIED.

4. Plaintiff's Motion For Relief From Judgment Or Order; Motion For Sanctions (D.I. 90) is DENIED.

5. Defendants' Motion to Dismiss Plaintiff's Amended Complaint (D.I. 8) is GRANTED.

/s/ Joseph J. Farnan Jr.

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-1986

ROBERT D. CUNNINGHAM JR., M.D.,
Appellant

v.

RICHARD W. RILEY, Secretary

Present: BECKER, Chief Judge, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES and WEIS*, Circuit Judges

**SUR PETITION
FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING EN BANC**

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing *en banc*, the petition for rehearing is DENIED.

* Senior Judge Weis, who sat on the original panel, is limited to panel rehearing only.

By the Court,

/s/ Ambro

Circuit Judge

Dated: June 24, 2002

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional provisions

U.S. Constitution – Fifth Amendment – No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Statutory provision

Section 504 of the Rehabilitation Act of 1973 – No otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Regulations implementing Section 504

34 CFR § 100.7(b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or

by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

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34 CFR § 100.7(c) *Investigations.* The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

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34 CFR § 100.7(d) *Resolution of Matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be so resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 108.8. (2) If an investigation does not warrant action pursuant to paragraph (1) of this paragraph (d) the responsible Department official or his

designee will so inform the recipient and the complainant, if any, in writing.

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34 CFR § 100.7(e) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

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34 CFR § 104.4 – A recipient may not directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state.

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34 CFR § 104.61 – The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 100.6-100.10 and part 101.

Appendix A to Part 104 (9) – Remedial action. When there has been a finding of discrimination, § 104.6 requires a recipient to take remedial action to overcome the effects of discrimination. Actions that might be required under paragraph (a)(1) include provision of services to persons previously discriminated against, reinstatement of employees and development of a remedial action plan. Should a recipient fail to take required remedial action, the ultimate sanctions of court action or termination of Federal financial assistance may be imposed.

Regulations associated with IDEA

34 CFR § 303.401 Definition of consent

As used in this subpart –

(a) *Consent* means that –

(1) The parent has been fully informed of all information relevant to the activity for which consent is sought, in the parent's native language or other mode of communication;

(2) The parent understands and agrees in writing to the carrying out of the activity for which consent is sought, and the consent describes that activity and

lists the records (if any) that will be released and to whom; and

(3) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

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34 CFR § 303.404 Parent consent

(a) Written parental consent must be obtained before

(1) Conducting the initial evaluation and assessment of a child under § 303.322; and

(2) Initiating the provision of early intervention services (see § 303.342(e)).

(b) If consent is not given, the public agency shall make reasonable efforts to ensure that the parent –

(1) Is fully aware of the nature of the evaluation and assessment or the services that would be available; and (2) Understands that the child will not be able to receive the evaluation and assessment or services unless consent is given.

Lead Agency Procedures for Resolving Complaints

34 CFR § 303.510 Adopting complaint procedures –

(a) General. Each lead agency shall adopt written procedures for –

(1) Resolving any complaint, including a complaint filed by an organization or individual from another

State, that any public agency or private service provider is violating a requirement of Part C of the Act or this Part by –

(i) Providing for the filing of a complaint with the lead agency; and

(ii) At the lead agency's discretion, providing for the filing of a complaint with a public agency and the right to have the lead agency review the public agency's decision on the complaint; and

(2) Widely disseminating to parents and other interested individuals, including parent training centers, protection and advocacy agencies, independent living centers, and other appropriate entities, the State's procedures under Secs. 303.510-303.512.

(b) Remedies for denial of appropriate services. In resolving a complaint in which it finds a failure to provide appropriate services, a lead agency, pursuant to its general supervisory authority under Part C of the Act, must address: (1) How to remediate the denial of those services, including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child and the child's family; and (2) Appropriate future provision of services for all infants and toddlers with disabilities and their families.

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34 CFR § 303.511 – *An organization or individual may file a complaint*

(a) General. An individual or organization may file a written signed complaint under § 303.510. The complaint must include –

(1) A statement that the State has violated a requirement of Part C of the Act or the regulations in this part; and

(2) The facts on which the complaint is based.

(b) Limitations. The alleged violation must have occurred not more than one year before the date that the complaint is received by the public agency unless a longer period is reasonable because –

(1) The alleged violation continues for that child or other children; or

(2) The complainant is requesting reimbursement or corrective action that occurred not more than three years before the date on which the complaint is received by the public agency.

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34 CFR § 303.512 *Minimum State complaint procedures.* (2001)

(a) Time limit, minimum procedures. Each lead agency shall include in its complaint procedures a time limit of 60 calendar days after a complaint is filed under § 303.510(a) to –

(1) Carry out an independent on-site investigation, if the lead agency determines that such an investigation is necessary;

(2) Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

(3) Review all relevant information and make an independent determination as to whether the public agency is violating a requirement of Part C of the Act

or of this Part; and (4) Issue a written decision to the complainant that addresses each allegation in the complaint and contains –

(i) Findings of fact and conclusions; and

(ii) The reasons for the lead agency's final decision.

(b) Time extension; final decisions; implementation. The lead agency's procedures described in paragraph (a) of this section also must –

(1) Permit an extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint; and

(2) Include procedures for effective implementation of the lead agency's final decision, if needed, including –

(i) Technical assistance activities;

(ii) Negotiations; and

(iii) Corrective actions to achieve compliance.

(c) Complaints filed under this section, and due process hearings under Sec. 303.420. (1) If a written complaint is received that is also the subject of a due process hearing under Sec. 303.420, or contains multiple issues, of which one or more are part of that hearing, the State must set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process action must be resolved within the 60-calendar-day timeline using the complaint procedures described in paragraphs (a) and (b) of the section.

(2) If an issue is raised in a complaint filed under this section that has previously been decided in a due process hearing involving the same parties –

(i) The hearing decision is binding; and

(ii) The lead agency must inform the complaint to that effect.

(3) A complaint alleging a public agency's or private service provider's failure to implement a due process decision must be resolved by the lead agency.

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34 CFR § 303.512(4)(d) *Minimum State complaint procedures.* (1993)

Issue a written decision to the complainant that addresses each allegation in the complaint and contains –

(d) The right of the complainant or the public agency to request the Secretary to review the lead agency's final decision.

Federal Rules of Civil Procedure

F.R.C.P. Rule 60(b)

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a

prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. § 1265, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

QUESTIONS FOR:

Dr. Thomas Hehir
Director, Office for Special Education
U.S. Department of Education
330 "C" Street, SW Washington, DC 20202

The following questions are being asked to determine what the Office of Special Education and Rehabilitative Services' policy is regarding complaints filed under Part H. The answers are necessary in order for the U.S. District Court to determine what interpretation OSER is giving to the laws implementing Part H.

Response from Thomas Hehir:

Dear Dr. Cunningham:

I am writing in response to your letter dated August 21, 1998 in which you request that I answer several questions regarding Part C (formerly Part H) of the Individuals with Disabilities Education Act (IDEA). Please see the attached cover letter from the Office of the General Counsel regarding the status of your subpoena. I know that you have had substantial correspondence with the Office of Special Education Programs regarding your current case in the District Court of Delaware; the following responses have been drafted to clarify the issues you raise regarding Part C of IDEA. You asked for the answers to be primarily in a "yes" or "no" format and to the extent possible we have responded in that manner.

1. Who may file complaints of non-compliance with the guidelines under Part H?

Response from Thomas Hehir:

> Any organization or individual may file a signed written complaint with the state's lead agency, or, at the state's discretion, with a public agency, alleging violation(s) of Part C of IDEA. See 34 CFR 303.510 & 303.511. Please note that this applies to a state's complaint process, not to due process hearing procedures. Only parents have the right to request due process hearings. See 34 CFR 303.420.

2. May any person who has knowledge of possible non-compliance with the Part H guidelines file a complaint with the appropriate state agency?

Response from Thomas Hehir:

> Yes, see #1 above.

3. Is a person filing a complaint alleging non-compliance with the Part H guidelines required to have a close relationship to a child affected by the non-compliance? (For example, must the person filing the complaint be the parent of a child affected by non-compliance with the Part H guidelines, a teacher, school principal, etc., as opposed to simply being aware that the regulations contained in Part H are not being adhered to?)

Response from Thomas Hehir:

> No, see #1 above.

4. Has Robert D. Cunningham Jr., M.D. ever made requests for Secretarial Review with OSER asking for review of responses made to allegations that the regulations contained in Part H are not being adhered to?

Response from Thomas Hehir:

> Yes.

5. According to OSER's interpretation of the Part H regulations, did Robert D. Cunningham Jr., M.D. have the right or standing to file complaints with the Delaware lead agency alleging non-compliance with the Part H regulations?

Response from Thomas Hehir:

> Yes; as noted above, any organization or individual may file a signed written complaint with the state's lead agency, or, at the state's discretion, with a public agency, alleging violation(s) of Part C of IDEA. As you obviously fall within the category of an individual, you have the right to file complaints with the state's lead agency regarding potential noncompliance with IDEA. Of course, state law may provide additional requirements for filing that are not in conflict with federal law.

6. According to OSER's interpretation of the Part H regulations, did Robert D. Cunningham Jr., M.D. have the right or standing to request Secretarial Review with OSER of responses to complaints he had submitted to Delaware's lead agency?

Response from Thomas Hehir:

> Yes; you had the right to request Secretarial Review of final decisions regarding alleged violations of Part C of IDEA issued by Delaware's lead agency, the Delaware Department of Health and Social Services (DHSS), in response to complaints you filed with the DHSS.

7. What is OSER's obligation with regards to supervising and enforcing the implementation of the Part H guidelines by the state governments?

Response from Thomas Hehir:

The Department of Education (DOE) through the Office of Special Education Programs, oversees states for compliance with Part C of IDEA. There are a variety of ways that the DOE/OSEP can supervise and enforce the law, including the review and approval or disapproval of annual state applications for federal Part C funds.

Response from Thomas Hehir:

I trust this information will be of assistance to you. Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OSEP receives such a request, we will seek to protect, to the extent provided by law, personal information that, if released, could constitute an unwarranted invasion of privacy.

Sincerely,

/s/ Thomas Hehir
Director
Office of Special Education Programs

October 2, 1998

QUESTIONS FOR:

Robert Ford
Office for Civil Rights
U.S. Department of Education
The Wanamaker Building, Suite 515
100 Penn Square East
Philadelphia, Pennsylvania 19107

The following questions are being asked to determine what the Office for Civil Rights' policy is regarding complaints filed under Section 504 of the Rehabilitation Act of 1973. The answers are necessary in order for the U.S. District Court to determine what interpretation OCR is giving to the laws implementing Section 504.

Response from Robert Ford:

Dear Dr. Cunningham:

I am writing in response to your letter, dated August 21, 1998, in which you request that I answer several questions concerning who may file discrimination complaints under Section 504 of the Rehabilitation Act of 1973. Please see the attached cover letter from the Department of Education's (DOE) Office of the General Counsel regarding the status of your subpoena.

Your letter states that you wish the responses to some of these questions to be either "yes" or "no." To the extent possible, we have responded in that fashion, except where fuller explanation was required.

1. Who may file complaints of discrimination under Section 504 of the Rehabilitation Act of 1973 and its implementing regulation 34 CFR § 100.7(b)?

Response from Robert Ford:

> The regulation implementing Title VI of the Civil Rights Act of 1964, at 34 CFR Section 100.7(b) states, in part:
>
> > Complaints. Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint.
>
> The procedural requirements of the regulation implementing Title VI of the Civil Rights Act of 1964 (Title VI), at 34 CFR Sections 100.6-100.10, are incorporated by reference in the regulation implementing Section 504 of the Rehabilitation Act of 1973 ("Section 504"), at 34 CFR Section 104.61.

2. May any person who has knowledge of discrimination under Section 504 [CFR § 100.7(b)] file a complaint with OCR?

Response from Robert Ford:

> Yes.

3. Is a person filing a complaint alleging discrimination under Section 504 [34 CFR § 100.7(b)] required to have a close relationship to a child affected by the discrimination? (For example, must the person filing the complaint be the parent of a child affected by noncompliance with the Part H guidelines, a teacher, school principal, etc., as opposed to simply being aware that the regulations contained in Part H are not being adhered to?)

Response from Robert Ford:

> No, although OCR will not pursue complaint resolution activities in a matter concerning a minor child without permission of that child's parent or guardian.

4. Are people who file complaints with OCR alleging discrimination protected against retaliation or intimidation under 34 CFR § 100.7(e)?

Response from Robert Ford:

> Yes, but OCR has jurisdiction (i.e., may enforce 34 CFR 100.7(e)) only with respect to individuals, institutions, agencies or organizations that receive Federal financial assistance from the DOE or from other departments or funding agencies that have delegated their enforcement authority to the DOE. The regulation implementing Title VI of the Civil Rights Act of 1964, at 34 CFR Section 100.7(e) provides, in part, as follows:
>
> > *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.
>
> That section of the Title VI regulation is incorporated by reference in the Section 504 regulation, at 34 CFR Section 104.61, and provides a list of "protected activities" one of which is the filing of complaints.

5. Are individuals acting as advocates for the handicapped who file complaints with OCR protected from retaliation or intimidation under 34 CFR § 100.7(e)?

Response from Robert Ford:

Same answer as #4.

6. Are individuals acting as advocates for the handicapped who point out to state agencies that their policies are discriminatory against the handicapped protected from retaliation or intimidation under 34 CFR § 100.7(e)?

Response from Robert Ford:

The regulation does not specifically address this question. The language of regulation refers to individuals who file complaints and who engage in other protected activities. Some activities undertaken in advocacy on behalf of individuals with disabilities might be considered protected activities in some circumstances, and some might not.

7. Are individuals who file complaints on the behalf of the handicapped with the Office of Special Education and Rehabilitative Services alleging non-compliance with the Individuals with Disabilities Education Act protected from retaliation or intimidation under 34 CFR § 100.7(e)?

Response from Robert Ford:

34 CFR 100.7(e) does not apply to complaints alleging violations of the Individuals with Disabilities Education Act (IDEA), however, 34 CFR 100.7(e) would apply to complaints that constitute allegations of Section 504 violations.

8. Are individuals who file complaints on the behalf of the handicapped with the Family Policy Compliance

office alleging non-compliance with the Family Educational Rights and Privacy Act protected from retaliation or intimidation under 34 CFR § 100.7(e)?

Response from Robert Ford:

Same answer as in #7, however, note that only parents and eligible students may file complaints with the Family Policy Compliance Office pursuant to 34 CFR 99.63.

9. Has Robert D. Cunningham Jr., M.D. ever filed complaints with OCR alleging that handicapped children are being discriminated against under Section 504?

Response from Robert Ford:

Yes.

10. According to OCR's interpretation of Section 504, does Robert D. Cunningham Jr., M.D. have the right or standing to file complaints with OCR alleging discrimination against handicapped children being served in Delaware's Part H program?

Response from Robert Ford:

As stated in #2, anyone may file a complaint alleging discrimination in violation of Section 504 by recipients of Federal financial assistance. Please also see response to question 1.

11. According to OCR's interpretation of Section 504, is Robert D. Cunningham Jr., M.D. protected from retaliation or intimidation under 34 CFR § 100.7(e), implementing regulation of Section 504, for filing complaints that handicapped children are being discriminated against in Delaware's Part H program?

Response from Robert Ford:

Please see response to question #4. If an individual files a complaint with OCR alleging that a recipient of Federal financial assistance from the Department has discriminated against qualified persons with disabilities, that section of the Department's Section 504 regulation would protect the individual from retaliatory or intimidatory acts taken by the recipient because of that filing.

12. Has Robert D. Cunningham Jr., M.D. ever filed with OCR a complaint alleging that he was the victim of retaliation or intimidation under Section 504, implementing regulation 34 CFR § 100.7(e)?

Response from Robert Ford:

Yes.

Response from Robert Ford:

I trust this information will be of assistance to you. Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect, to the extent provided by law, personal information that, if released, could constitute an unwarranted invasion of privacy.

/s/ Robert A. Ford
Team Leader
September 24, 1998

cc: Wendella Fox
Stephen Shalet